

The Impact of Introducing an Affirmative Model of Consent and Changes to the Defence of Mistake in Tasmanian Rape Trials

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Declarations

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The research associated with this thesis abides by the international and Australian codes on human and animal experimentation, the guidelines by the Australian Government's Office of the Gene Technology Regulator and the rulings of the Safety, Ethics and Institutional Biosafety Committees of the University.

Abstract

The successful prosecution of sexual offences is regularly frustrated because jurors, judges and legal counsel embrace prejudicial stereotypes about what constitutes consent to sexual intercourse. In 2004 the Tasmanian Parliament instituted reforms to the state's Criminal Code that inserted a statutory definition of consent in s 2A and imposed additional constraints on the availability of the defence of mistaken belief in consent in s 14A. These changes were amongst the most progressive in the common law world. The reforms were designed to ensure that the issue of consent to sexual conduct would be evaluated according to standards of mutuality and reciprocity and that therefore, in accordance with s 2A(2)(a) of the Tasmanian Criminal Code, proof that the complainant did not *communicate* consent is sufficient to establish absence of consent. This thesis looks at the way that the amended provisions are being implemented by conducting a content analysis of trial transcripts of sexual offences cases heard in the Tasmanian Supreme Court in which the determination of the issue of absence of consent was critical to the case outcome. The research also includes interviews with judges of the Supreme Court of Tasmania and legal practitioners admitted to the Tasmanian bar. The treatment of the issue of consent to sexual conduct is examined to determine whether or not it is consistent with the intentions articulated by parliament and the reform advocates. The findings from this research provide evidence that the reforms are not being implemented as intended. There is evidence that judges and counsel continue to rely on a pre-reform notion of consent and indications that the prosecution tailor cases to their understanding of the jury's preconceived views about rape, rape victims and consent to sexual intercourse. The thesis concludes that the general reluctance or inability to engage with the new concept of consent that the reforms have instituted must be addressed by providing education about the meaning and effect of the amended legislation if there is to be any hope of achieving positive attitudinal change within both the criminal justice system and the broader community.

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Chapter 1: Introduction

1.1 Introduction

In 2004 the Tasmanian government instituted reforms to the law of rape and other sexual offences in a bold attempt to expand the boundaries of what has traditionally been considered ‘real rape’.¹ These changes were amongst the most progressive in the common law world. This thesis examines those reforms, which enacted a new definition of consent and spelled out restrictions on the defence of mistaken belief in consent. The core of the research is an analysis of trial transcripts of relevant cases heard in the Supreme Court of Tasmania, conducted with the aim of evaluating whether these reforms are being implemented in accordance with the objectives identified in government debate on the legislation. The thesis is a crucial next step in determining whether the legislative amendments are being implemented in accordance with the stated aims, whether they have had an impact on the prosecution of sexual offences or whether, in fact, the architects of the reforms were over-optimistic about the capacity of legislative change to effect material change in this area. It is distinguished from other studies in that it focuses, not on a theoretical analysis of the way the formal statement of the law in relation to consent has been structured, but on how the legislative provisions are being interpreted and implemented in practice. It evaluates whether legislative reform that claims to respond to the realities of rape can improve outcomes for the rape complainant or whether, as Bronitt contends, the new definitions will merely be interpreted by judges and juries using the same discredited touchstones of relevancy and credibility.²

1.2 Thesis Outline

The thesis is divided into eight chapters. It adopts the practice of using feminine pronouns to refer to victims and masculine pronouns to refer to their assailants in recognition of the reality that most sexual assaults are perpetrated by men on women.³ Both ‘victim’ and ‘complainant’ are used throughout to designate individuals who have

¹ Estrich is credited with coining this expression. Real rape is carried out by a stranger, often with the assistance of a weapon and the victim suffers serious injury in the course of her vigorous efforts at resistance: Susan Estrich, *Real Rape* (Harvard University Press, 1987).

² Simon Bronitt, ‘Rules of Recent Complaint’ in Easta (ed), *Balancing the Scales: Rape, Law Reform & Australian Culture* (Federation Press, 1998) 41, 42–3.

³ See, eg, Australian Bureau of Statistics 2010, *Recorded Crime — Victims*, Australia, cat no 4510.0, ABS, Canberra.

been the subject of a sexual assault although ‘complainant’ is only used in cases where legal proceedings have been commenced.

Chapter 1 begins by briefly summarising the structure and content of each of the ensuing chapters. It then discusses the rationale behind the research project, offers a brief explanation of the methodology used and provides a general statement of the objectives of the research. The remainder of the chapter explains the fundamental importance of the issue of consent in the context of sexual offences and the ramifications of this for complainants. It explores the reasons why consent is problematic in sexual relations generally and in sexual offences cases in particular and links the consent problem to the historically high attrition rates and low conviction rates for such offences. It then navigates the recent history of rape law reform in Tasmania and explains how the latest legislative amendments constitute an attempt to deal with the problem by re-conceptualising the notion of consent. The inclusion of a statutory definition of consent and additional circumstances where consent is prima facie absent in s 2A of the Criminal Code⁴ and the circumscribing of the defence of mistaken belief in s 14A were intended to serve a number of functions: to preclude reliance on rape stereotypes in jury deliberations on absence of consent; to accord evidence of an absence of positive expressions of consent due weight in the determination of the issue of consent; and to reconstruct absence of consent as a lack of positively communicated consent rather than as sufficiently communicated dissent. These initiatives followed earlier reforms, which had likewise sought to counteract the perceived reliance of juries on stereotypical attitudes towards rape and their apparent reluctance to convict even in the face objectively compelling evidence.⁵ Previous legislative reforms abolished the judicial requirement to issue a corroboration warning in sexual offences cases,⁶ attempted to restrict the inferences that could be drawn from a delay in complaint⁷ and implemented controls on the admissibility of evidence relating to the sexual experience of the complainant.⁸

The chapter then proceeds to a detailed discussion of the 2004 amendments, examining what the reformers hoped to achieve, the grounds on which the original Bill was criticised and the way the provisions were eventually framed in response to those objections. Since the 2004 reforms were exclusively legislative in nature, the concluding

⁴ *Criminal Code Act 1924* (Tas) sch 1 (‘*Criminal Code*’).

⁵ See Task Force on Sexual Assault and Rape, *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998); Terese Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press, 2000).

⁶ *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164. Section 164 of the *Evidence Act* re-enacted the earlier provision in the Code.

⁷ *Criminal Code* (Tas) s 371A, as inserted by *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) item 30.

⁸ *Evidence Act 2001* (Tas) s 194M.

section of this chapter makes reference to the ongoing debate amongst feminist legal scholars about the limitations of statutory reform as a corrective for the problems that bedevil the prosecution of sexual offences.

Chapter 2 examines the phenomenon of rape myths in their historical context in order to shed light on their persistence in our cultural subconscious and to demonstrate how their continued application in modern trials of sexual offences is baseless. It argues that originally, rape stereotypes may have gained credence because they were supported by aspects of contemporary socio-cultural reality. However, their continued acceptance cannot be explained in this way. The chapter considers the features of rape stereotypes that directly influence the evaluation of the issue of absence of consent in the modern trial and which present continuing difficulties for the successful prosecution of sexual offences. It argues that myths about rape are a product of particular historical attitudes towards women and female sexuality and a consequence of women's actions in response to historical social constraints placed upon them. The process of explaining their antiquated origins enables us to confront these attitudes, expose the way they inappropriately 'inform our conscious reasoning processes'⁹ in a modern context and thereby neutralise them. Chapter 2 questions the sincerity of efforts to negate the influence of rape stereotypes on the prosecution of sexual offences when discriminatory attitudes about female complainants are still evident in the law and in trial practices. It suggests that the fallacy of these myths may be more readily admitted if their ancient provenance is revealed.

Chapter 3 examines reform initiatives in various national and international jurisdictions and evaluates their potential for myth-proofing the sexual offences trial. It begins with an analysis of the earliest of the modern reform efforts, the so-called Michigan reforms which sought to reframe rape as an offence of violence rather than as a sexual offence. The various reforms are grouped according to the theoretical rationale that informs them and an assessment is made of the relative merits of each of the different theoretical positions. The chapter concludes that the Tasmanian reforms, which embrace the principles of female sexual autonomy, and mutuality and reciprocity in sexual encounters represent a rejection of historical understandings of passive, male regulated female sexuality. Although they reference earlier reform efforts, the inclusion of a legislative prescription that consent be communicated constitutes a separate and additional category of reform. Properly marshalled, the amended Tasmanian consent provisions should be an antidote to the malign influence of stereotypical assumptions in rape cases.

⁹ Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87, 89.

Chapter 4 describes the empirical research that is at the core of the thesis. The research was designed to establish whether in fact the potential of the reforms to reconfigure the understanding of rape and consent to sexual activity is being realised. In order to establish whether the reforms to the Code are being implemented as Parliament intended a qualitative analysis was conducted of transcripts of sexual offences trials heard in the Supreme Court of Tasmania in which absence of consent or mistaken belief in consent was in issue and to which the amended consent provisions in the Criminal Code applied. Supplementing this analysis were transcripts of interviews that the author conducted with members of the Tasmanian Supreme Court bench and legal counsel. Chapter 4 details the structure of the research and explains the considerations underpinning the selection of the trials and interviewees, and the qualitative analysis protocols by which the process of examining the trial transcripts was bound. The coding exercise reveals that the prosecution continue to rely on a pre-reform notion of consent and that the positive consent standard which is mandated by the reforms is not insisted upon in the court. Absence of consent is primarily constructed by the prosecution according to traditional indicia— manifest dissent, evidence of force or threat of force and victim incapacity—and whilst such evidence may be important in establishing absence of consent, it is not put to work within the affirmative consent framework that the reforms establish.

Chapters 5, 6 and 7 present the findings of the research in the form of case studies of individual trials. Not all of the trials that were included in the study are analysed in detail. Instead, selected cases are discussed on the basis that they exemplify one of the major themes identified as a primary basis on which the prosecution constructed absence of consent. Each of the chapters deals with a separate theme: chapter 5 examines the way that evidence of the complainant's dissent is used to establish absence of consent; chapter 6 examines the way the Crown marshals evidence of force or threat to prove absence of consent; and chapter 7 examines how the Crown deals with evidence that the complainant did not communicate consent. It is argued that the prosecution could have refocused their case theory to engage with the positive consent standard and avoided some of the difficulties that are revealed by the results of the analysis. It is not contended that the cases were wrongly decided, only that they were not prosecuted in accordance with the new consent provisions. The implication from these findings is that the potential that the new provisions offer to negate the influence of prejudicial assumptions about female complainants is not being adequately utilised.

The thesis concludes with a summary of the main reasons for this failure to engage with the reforms. Chapter 8 identifies failings in the construction of the prosecution's theory of the case and inadequacies in explaining to jurors the legal notion

of consent and the rules relating to the defence of mistaken belief in consent as the primary barriers to the successful implementation of the reforms. The analysis of the trials also suggests that there are related difficulties in establishing the limits of the legal notion of consent, in embracing the positive consent standard and in formulating jury directions that are both sufficiently comprehensive and accessible to lay jurors. The chapter then moves to consider further reform proposals, including more extensive criminal justice training for legal professionals about the aims and context of legislative reform efforts, changes in the procedural law and the application of restorative justice practices to sexual offences cases such that their resolution is no longer determined in an adversarial trial setting. It may be that the limits of legislative reform have been reached if those who work with the new consent provisions are unwilling or unable to implement them in accordance with Parliament's intention and fail to endorse the reconfigured understanding of illegal sexual conduct. If that is the case, then innovative approaches to reform may be called for.

1.3 Research Rationale

The significant amendments enacted to the law of rape and sexual assault in Tasmania in 2004 were amongst the most progressive in the common law world and, as yet, there has been no research monitoring their implementation. The current research fills this lacuna and is an important and very necessary step in evaluating the impact of the reforms. This thesis examines the operation of the 2004 reforms with the broad aims of assessing how they are being implemented in the trial setting and whether the aims of the reformers have been met. To summarise, these were: to clarify the concept of consent for the jury; to expand the range of circumstances in which a jury could determine that consent was absent beyond the traditional circumstances of force, fraud, threats and incapacity to consent; and to establish a standard of mutuality as the gauge by which the existence and legitimacy of consent is to be evaluated. The purpose of the amendments was explained by the Attorney General in the Bill's second reading speech. Ms Jackson stated:

The proposed amendment to section 2A repeals the current provision, and provides that consent should be based on 'free agreement', and imports the notions of mutuality and reciprocity into the concept of consent. ... Free agreement requires that there is some positive evidence of agreement ... rather than simply an absence of dissent. In such circumstances, silence or passivity cannot be interpreted as agreement.¹⁰

The real significance of the amendments is thus the complete change in focus away from evidence of active dissent to evidence of an absence of communicated agreement. This is

¹⁰ Tasmania, *Parliamentary Debates*, House of Representatives, 3 December 2003, 44 (Judy Jackson, Attorney-General).

achieved by legislatively defining ‘consent’ as ‘free agreement’ in s 2A and elaborating upon this definition by providing an expanded list of circumstances where there is absence of consent. Paragraphs (2)(a)–(i) provide examples of conduct which does not constitute free agreement, primarily s 2A(2)(a) which provides that a person does not freely agree where they do not say or do anything to communicate consent.¹¹ The new s14A also provides that, in the context of the identified sexual offences,¹² a mistaken belief in consent is neither honest nor reasonable in particular given circumstances. These circumstances include, in s 14A(1)(c), a failure to take positive steps to ascertain the existence of consent. The effect of these two provisions goes further than just prohibiting reliance on evidence that the complainant did not signal her refusal as evidence of consent or as the evidentiary basis for mistaken belief in consent. Positive evidence of consent is now required to refute claims of non-consensual sex. The amended provisions should also facilitate proof of rape by limiting the types of evidence that may be relied upon as relevant indicia of consent or as a basis for a mistaken belief in consent since evidence about consent must be evaluated according to whether it establishes that the complainant was freely agreeing to the proposed acts. The importance of this research is that it reveals how the consent provisions are being marshalled to facilitate the prosecution and proof of sexual offences and provides an empirical basis for any proposals to more effectively implement the reforms.

Rape scholarship is a very wide field with many inter-locking research strands. This study focuses only on one particular area and, consequently, there are aspects of the rape problem that are necessarily beyond the scope of this thesis.

1.3.1 Key Objectives

The key objectives of the research are:

- 1) To examine the way in which the concept of consent is dealt with in the context of sexual offences trials:
 - To examine how the concepts of ‘consent’ and ‘absence of consent’ are explained to juries in the trial judges summations and to explore whether judges are reflecting the view of consent that the reforms sought to promote
 - To examine how ‘absence of consent’ is constructed by the Crown

¹¹ Section 2A(2)(a) states: Without limiting the meaning of ‘free agreement’, and without limiting what may constitute ‘free agreement’ or ‘not free agreement’, a person does not freely agree to an act if the person –

(a) does not say or do anything to communicate consent.

¹² Namely, sexual intercourse with a young person (s 124), indecent act with a young person (s 125B), indecent assault (s 127), aggravated sexual assault (s 127A) and rape (s 185).

- To examine how ‘consent’ is constructed by the defence
- 2) To examine whether the evidentiary foundation sufficient to raise the defence of mistaken belief in consent has become more demanding in light of the fact that s 14A now explicitly requires evidence of reasonable steps taken to ascertain consent as a precondition for reliance on the defence
 - 3) To establish whether the defence of mistake continues to be founded on traditional assumptions and prejudices about female sexuality
 - 4) To determine whether there has been a change in the attitude of the Crown exemplified by the prosecutorial policy towards sexual offences. Is there a change in the nature of the cases being prosecuted? Is there, for example, a reduced reliance on evidence of force or violence? Are cases that involve a passive victim being pursued?
 - 5) To determine whether there has been a change in the attitude of defence counsel evidenced by advice given to clients in relation to guilty pleas
 - 6) Finally, to consider, in light of the above, whether legislative initiatives have reached the limits of their effectiveness in relation to rape law reform and whether it is time to focus on other avenues for reform.

1.3.2 Methodology

A more detailed explanation of the research methodology is provided in chapter 4. In short, the research consisted of a qualitative content analysis of contested adult sexual offences cases tried in the Tasmanian Supreme Court from 2004 till 2008 in which absence of consent or mistaken belief in consent was in issue. The trial transcripts of these cases represented the main data set. A subsidiary data set consisted of the transcripts of interviews conducted with judges of the Supreme Court of Tasmania and legal practitioners admitted to practise in Tasmania. The interview responses supplemented, but were very much ancillary to, the findings of the analysis of the trial transcripts by providing anecdotal opinions on the operation of the new rape laws. Recordings were made of each of the interviews. These were later transcribed and a content analysis conducted on them.

1.4 The Role of Consent in Sexual Offences

Absence of consent is at the heart of the legal wrong of rape and many other sexual offences. It is consent that marks the boundary between legitimate and illegitimate adult sex. The Tasmanian Criminal Code, for example, defines rape as sexual intercourse with

another person without that person's consent.¹³ The Victorian definition refers to sexual penetration without consent¹⁴ and the other Australian jurisdictions employ similar wording.¹⁵ In the majority of trials of sexual offences in which absence of consent is an element to be proved by the prosecution, the existence of consent is in dispute rather than the identity of the perpetrator or whether the alleged acts in fact took place. For example, in her study monitoring the operation of the 1987 reforms to the definition of consent in the Tasmanian Criminal Code, Henning found that in 44 of the 55 sexual offences trials analysed, the ingredient of absence of consent was in dispute.¹⁶ In a similar vein, a study of Victorian rape trials found that more than 53% of cases raised either the defence of consent, mistaken belief in consent or a combination of the two.¹⁷

In common with all other Australian jurisdictions, under the Tasmanian Criminal Code absence of consent forms part of the actus reus of rape which the Crown must prove beyond reasonable doubt in order to make out the offence. Given that the circumstances of most sexual assaults are known only to the complainant and the accused the complainant's testimony may often be the sole foundation for the assertion of absence of consent. Delayed reporting and the associated destruction of potentially probative forensic evidence is also, for a variety of reasons, a common feature of the offence.¹⁸ It follows that by investing consent with primary importance in delineating licit from illicit sexual activity the conduct of the complainant is inevitably the subject of greater scrutiny than is the conduct of the accused. It is said that in a rape case the victim's credibility rather than the accused's culpability is on trial since evidence about her prior behaviour and response to the alleged assault will be critical to the jury's determination of both the

¹³ *Criminal Code* (Tas) s 185.

¹⁴ *Crimes Act 1958* (Vic) s 38(2)(a).

¹⁵ See *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) s 61I; *Criminal Code* (NT) s 192; *Criminal Code* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code* (WA) s 319.

¹⁶ Henning, above n 5, 39.

¹⁷ Melanie Heenan and Helen McKelvie, Attorney-General's Legislation and Policy Branch, Department of Justice (Vic), *The Crimes (Rape) Act 1991: An Evaluation Report*, Report No 2 (1997). See also Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Interim Report No 42 (1991) Appendix 3, 86; David Brereton, 'How Different are Rape Trials? A Comparison of the Cross-Examination of Complainants in Rape and Assault Trials' (1997) 37 (2) *British Journal of Criminology* 242. In Brereton's study of 40 rape trials conducted in the Melbourne County Court in Victoria between 1989 and 1991 he found that in 79 % of 'complainant-defendant pairs' consent or belief in consent was the main line of defence: at 248.

¹⁸ See Jeanne Gregory and Sue Lees, *Policing Sexual Assault* (Routledge, 1999) 119; Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996) 58–9; Catherine Roberts, *Women and Rape* (New York University Press, 1989) 81–5; Daniel Silverman et al, 'Blitz Rape and Confidence Rape: A Typology Applied to 1000 Consecutive Cases' (1988) 145(11) *American Journal of Psychiatry* 1438, 1440; Ruth Hall, *Ask Any Woman: A London Inquiry into Rape* (Falling Wall Press, 1985) 115.

question of the existence of consent and the question of the accused's belief in consent.¹⁹ Consequently, a strong performance by the complainant in the witness box is usually indispensable to a successful prosecution. In cases where absence of consent is contested the fate of the accused rests on whether the chief prosecution witness can convince the jury of her true victim status. It is in the attempt to resolve this issue that the complainant's credibility is vulnerable to attack from the defence. She may be cast as an unreliable or even an untruthful witness, ruthlessly cross-examined in an endeavour to expose inconsistencies in her account. She may be blamed for precipitating the assault or censured for failing to take responsibility for her own sexual safety.²⁰ The requirement to prove absence of consent may also allow prejudicial assumptions about rape complainants and female sexual behaviour in general to assume probative significance.

1.4.1 Rape Myths and Consent

The defence bears an ethical obligation to its client to challenge and rigorously test the prosecution case, however there is a particular concern that the complainant is often subject to a style of cross-examination that exploits stereotypical social attitudes about appropriate female behaviour and typical victim responses to sexual assault.²¹ These stereotypical beliefs are widely referred to as 'rape myths'. They are defined by Gerger and colleagues as:

descriptive or prescriptive beliefs about sexual aggression (i.e., about its causes, context, consequences, perpetrators, victims, and their interaction) that serve to deny, downplay or justify sexually aggressive behaviour that men commit against women.²²

¹⁹ See Steffen Bienenck and Barbara Krahé, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?' (2011) 26(9) *Journal of Interpersonal Violence* 1785; Michele Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56(4) *Probation Journal* 379. It is also the case that the credibility of the complainant may be important in sexual offences cases involving under-age complainants where, exceptionally, consent does provide a defence to the charge. See the consent provisions in the *Criminal Code* (Tas) s 124(3).

²⁰ For an account of the way the traditional conception of the victim prototype in terms of chastity and sexual morality has been reconfigured in terms of responsibility and risk-averseness see Lise Gotell, 'Rethinking Affirmative Consent in Canadian Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865.

²¹ See Burman, above n 19; S Lees *Carnal Knowledge: Rape on Trial* (Hamish Hamilton, 1996); G Chambers and A Millar, Scottish Office Central Research Unit, *Prosecuting Sexual Assault* (1986). But see M Kebbell, C O'Kelly and E L Gilchrist, 'Rape Victims' Experiences of Giving Evidence in English Courts: A Survey' (2007) 14(1) *Psychiatry, Psychology & Law* 111 where the findings from a small-scale study of alleged rape victims' experiences of giving evidence in court showed high levels of satisfaction with the process: at 117–18.

²² Heike Gerger et al, 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33(5) *Aggressive Behavior* 422, 423.

They are descriptive because they mark out the parameters of so-called real rape and prescriptive because they establish an archetype of rape against which *all* accusations of rape must be measured. Belief in men's uncontrollable sexual passions and women's culpability in exciting them both justifies and normalises male sexual aggression. Belief in the ideal of the sexually virtuous woman entails an understanding that a genuine victim will resist her assailant to the utmost in order to protect her virtue. Resistance that falls short of that standard can be reinterpreted as consent. The prevalence of 'rape supportive attitudes'²³ is well documented in the literature²⁴ and it is important to note that acceptance of stereotypical beliefs has been shown to influence discretionary decision making at all stages of the criminal justice process. The victim may choose not to report for fear she will not be believed if the assault does not match the stereotype, the police may decide not to lay charges²⁵ or the case may fail at the prosecution stage because it offers poor prospects of conviction. Empirical research into the characteristics of rapists and their victims does not support these stereotypes²⁶ and yet they enjoy an unwarranted influence on assessments of the credibility of the complainant in trials of sexual offences.²⁷ Some male jurors believe that the complainant's level of alcohol consumption, the clothes she was wearing or her sexually provocative behaviour are factors that are probative of consent.²⁸ Similarly, if her actions post-assault do not conform to the victim stereotype it may be difficult for a jury to reconcile her behaviour with the allegations of coercive sex. A failure to report the incident at the first opportunity, for example, may cast doubt on a complainant's later accusation of non-

²³ K B Anderson, H Cooper and L Okamura, 'Individual Differences and Attitudes Toward Rape: A Meta-analytic Review' (1997) 23(3) *Personality and Social Psychology Bulletin* 295; Linda Anderson et al, 'The Effectiveness of Two Types of Rape Prevention Programs in Changing the Rape-Supportive Attitudes of College Students' (1998) 39(2) *Journal of College Student Development* 131.

²⁴ See, eg, Martha Burt, 'Cultural Myths and Supports for Rape' (1980) 38(2) *Journal of Personality and Social Psychology* 217; Colleen Ward, 'The Attitudes Toward Rape Victims Scale' (1988) 12(2) *Psychology of Women Quarterly* 127; Gerger et al, above n 22.

²⁵ Jan Jordan, 'Beyond Belief? Police, Rape and Women's Credibility' (2004) 4(1) *Criminal Justice* 29.

²⁶ Ellison and Munro cite research on rape trials that debunks assumptions about victims' reactions to sexual assault: Louise Ellison and Vanessa E Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202, 203.

²⁷ See, eg, Temkin's interviews with barristers involved in prosecuting and defending rape cases reported in Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219.

²⁸ See Ellison and Munro, above n 26, 202–3 and the studies cited therein; Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (2007) 344 *Trends and Issues in Crime and Criminal Justice* 1; Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants' (2005) 45(1) *British Journal of Criminology* 25; P Tetreault, 'Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials' (1989) 7 *Behavioural Sciences and the Law* 243.

consensual sexual conduct as delayed complaint is considered inconsistent with the behaviour of a 'real' victim.²⁹

Left unchallenged, stereotypes about rape may effectively deny that the complainant's account of her experience of rape is worthy of respect. At the outset, however, any attempt to address the difficulty of proving absence of consent in the legal context must acknowledge the inherently problematic nature of consent in the broader context of sexual relations generally.

1.5 The Problem of Consent

There is a vast cross-disciplinary field of scholarship that considers the nature of consent, the way it is constructed and the transformative role it plays in political, economic, social and sexual relations. In the context of the regulation of sexual interactions, law reform efforts that privilege absence of consent as the marker of illegal sex have sought to reduce ambiguity about the legal meaning of consent. Nevertheless, it remains the case that definitional issues are central to the consent 'problem'. The legislative response in Tasmania to the task of establishing the legal parameters of consent to sex has been to define consent in relatively broad terms as 'free agreement' and then to refine the definition by cataloguing illustrative examples of non-consent. If the spectrum of consent is book-ended by free, autonomous agreement at one extreme and enumerated instances which conclusively establish the absence of consent at the other, the remaining intermediate area resists classification in the absence of determinate criteria of valid consent. What good law should aim to do is to restrict as far as possible reliance on extra-legal considerations and ensure that the issue is considered in a strictly legal context.

1.5.1 Consent as an Indeterminate Concept

Communication in consensual sexual relations is typically subtle and ambiguous, characterised by suggestion, tacit understandings and wordless utterances rather than by stark and unequivocal offer, counter offer, acceptance or rejection.³⁰ Consent is comprehended in different ways and there is likely to be a similar lack of uniformity in the way that the concept of communicated consent is understood. Signals about consent are thus susceptible to misinterpretation. Since consent in the sexual domain cannot readily fit within a legal contract paradigm, the great challenge for rape laws is to set down appropriate criteria of valid consent and limit the circumstances in which a genuine

²⁹ Ellison and Munro, above n 26, 209–10.

³⁰ This is not to suggest that, in other spheres of human interaction where formal procedures for consent exist consent is unproblematic. Ostensible consent attested by a signature on a legal contract, for example, may be illusory because induced by fraud or duress.

misreading of signals will be exculpatory. The task of developing fixed criteria is complicated by the fact that the model of normal sexual intercourse against which prohibited sexual conduct is juxtaposed, is rooted in social and cultural attitudes that blur the boundaries between consent and non-consent.³¹ There is no consensus as to the manner of inducements that destroy the morally and legally transformative effect of ostensible consent, nor as to the manner of inducements that yet preserve the authority of consent. There is also no consensus about the type of actions that may legitimately be interpreted as indicia of consent. The short skirt that one individual may interpret as a signal of sexual availability may, for a differently socialised individual, convey no sexual cues.

While the complainant's state of mind is the central issue for the jury, the striking contradiction in the traditional treatment of consent in sexual offences cases is that the prioritisation of consent does not necessarily privilege the female complainant's subjectivity.³² In the legal arena, to say nothing of the broader social context, consent is a male construct. The structure and expression of rape laws reflect male hegemony, where man possesses and woman is possessed, submission is equated with consent, and even persuasion, which in other contexts would amount to assault, may be excused if the woman eventually acquiesces.³³ As Pateman explains:

Consent must always be given to something; in the relationship between the sexes, it is always women who are held to consent to men. The 'naturally' superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a 'naturally' subordinate, passive woman 'consents'.³⁴

In effect the jury assesses, not whether the complainant was actually consenting, but how radically her story departs from this normative model of sexual interactions between men and women. Since there is often scant forensic or medical evidence or third-party witnesses to assist the rape jury in its deliberations on the ingredient of absence of

³¹ See, eg, Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57(1) *Modern Law Review* 10; Ngaire Naffine, *Feminism & Criminology* (Allen & Unwin, 1997).

³² In the UK case of *R v Malone* [1998] Crim LR 834, the court held that there was no requirement that absence of consent be demonstrated or communicated in order to establish that element of the offence of rape. Whilst such a conclusion appears to prioritise the complainant's subjective state of mind, ultimately it may do little to protect female sexual autonomy. In practice, evidence of dissent may be necessary to defeat an accused's claim that he believed the victim was consenting. The plausibility of this claim is likely to be evaluated by the jury according to the normative model of sexual interactions between men and women and therefore likely to privilege the male perspective. See the discussion which follows.

³³ Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 63–5; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 34–6; Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989). MacKinnon asserts: 'Coercion legitimated becomes consent': at 238.

³⁴ Carole Pateman, 'Women and Consent' (1980) 8(2) *Political Theory* 149, 164. See also Naffine's treatment of the possessive, heterosexual model of sexual relations; Naffine, 'Possession: Erotic Love in the Law of Rape', above n 31.

consent, jurors may fall back on their accumulated knowledge and beliefs about rape and sexual relations in general to cover this information deficit. Beliefs about typical or appropriate male and female sexual behaviour are socially and culturally constructed and research shows that they are likely to embrace the normative model of sexual relations and prejudicial assumptions about female sexuality and real rape stereotypes.³⁵

Discriminatory attitudes will be especially problematic in cases which do not fit the rape stereotype since these cases lack objective evidence of non-consent.³⁶ Whilst signs of violence or serious injury may be compelling evidence of non-consent for most jurors, other physical and verbal cues are likely to be more ambiguous. Whether the jury accepts the complainant's account depends on whether it correlates with their expectations about how a genuine victim would behave. It is not enough that she has cried rape—she must also have acted it.³⁷

Even where the Crown is able to establish the element of absence of consent the defence of mistaken belief in consent may still be available to the accused.³⁸ His judgement that what occurred was consensual will naturally be moulded by the extent to which he participates in broader social assumptions that equate a particular style of dress, for example, or a certain level of alcohol consumption with a woman's willingness to engage in sexual conduct. The relevant Tasmanian provision, s 14 of the Code, stipulates that this belief must be both honest and reasonable.³⁹ Section 14 is construed in tandem with s 14A which was inserted along with the amendments to s2A. It enumerates specific situations where a belief in consent will not be honest or reasonable, but generally the reasonableness of the defendant's belief will be a matter for the jury. Prima facie, if the belief in consent is justified by baseless assertions about female sexuality then it should fail the test of reasonableness. However, if the adjudicators subscribe to the same cultural attitudes as the accused they are likely to empathise with his mistake.⁴⁰ The dis-utility of

³⁵ Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 121. The authors discuss the findings from their original empirical research and conclude that these accord with findings from other studies that rape stereotypes are very influential in judgments in rape cases. See also Taylor, above n 28; Louise Ellison and Vanessa E Munro, 'Of "Normal" Sex and "Real" Rape: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291.

³⁶ Temkin and Krahé, above n 35.

³⁷ Given that in most jurisdictions research with actual juries is not permitted, it must be acknowledged that the foregoing assessment of likely juror responses to evidence of absence of consent must be extrapolated from studies which do not employ actual juries and which mostly do not involve actual rape trials. Nevertheless, it is argued here and elsewhere that mock jury studies can yield valuable insights into the factors that affect the jury decision-making process. See, eg, Ellison and Munro, above n 26, 206.

³⁸ In Tasmania, that mistake as to consent is available as a defence to rape was recognised in the case of *Snow v The Queen* [1962] Tas SR 271.

³⁹ *Criminal Code* (Tas) s 14.

⁴⁰ See, eg, Carol Bohmer, 'Acquaintance Rape and the Law' in Andrea Parrot and Laurie Bechhofer (eds), *Acquaintance Rape: The Hidden Crime* (Wiley, 1991) 321.

placing consent as the central issue is thus brought into stark relief when a flimsy structure of erroneous beliefs can nullify even compelling evidence of non-consent.

Some commentators argue that all sexual relations are located within a system of exploitative practices with rape at the extreme end of the spectrum.⁴¹ If male aggression and female submission are constituents of normative sexuality then, as Gauthier claims, ‘we lack the bright line needed to separate sexual violence from ordinary sexuality in the courtroom’.⁴² The level of violence considered sufficient to vitiate apparent consent will vary for individual jurors. It seems likely that for some the threshold sits ‘just above the level set by what is seen as normal male sexual behavior’.⁴³ And arguably this may encompass a significant degree of violence.⁴⁴ The normalisation of sexual violence also affects how the victim of sexual assault understands her experience. Where forceful male sexuality is accepted as a characteristic of normal sexual conduct then even the woman herself who is coerced into sex will believe that the conduct was consensual, even if unwelcome.

Consent is recognised and approved in the legal context as a reliable hallmark of legitimate sexual conduct. This confidence is potentially misplaced: first because of the inherent definitional issues already described and second, because of the assumption that the parties enjoy the same degree of personal autonomy and are equally free to give or withhold consent to sex. In fact, such an assumption disregards institutionalised power imbalances (physical, political, economic and social) that continue to restrict women in matters of sexual choice.

1.5.2 Assumptions about Autonomy

It is axiomatic that women continue to suffer both social and economic disadvantage and inequalities in these spheres impinge on the freedom to choose in matters of sexual intimacy. If one is financially dependent on one’s sexual partner, for example, then an element of obligation may permeate the sexual relationship. A society that rewards men for sexual prowess but denigrates sexually voracious women, the so-called sexual double standard,⁴⁵ tends to discourage the articulation of female sexual desires. The legal system, despite the apparent tendency of modern rape law to concern itself with the subjective reality of the complainant, entrenches a disrespect for female sexual autonomy that is

⁴¹ Catharine A MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987) 86.

⁴² Jeffrey Gauthier, ‘Consent, Coercion, and Sexual Autonomy’ in Keith Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press, 1999) 71.

⁴³ Catharine A MacKinnon, ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ (1983) 8(4) *Signs* 635, 649.

⁴⁴ *Ibid.*

⁴⁵ See Martha Chamallas, ‘Consent, Equality and the Legal Control of Sexual Conduct’ (1988) 61 *Southern California Law Review* 777, 788–90.

emblematic of the wider social discrediting of women's rights over their own bodies.⁴⁶ In the trial setting non-consent can be legitimately re-interpreted as consent, 'no' can mean 'yes' or can be heard as 'a deliberate incitement ... to persuade a little harder',⁴⁷ consent can co-exist with evidence of considerable physical or psychological coercion and as a result the chances of securing a conviction for rape are drastically compromised. One of the reasons that the problem of consent so exercises the mind of legal scholars and advocates of rape law reform is that there is a strong link between the problematic nature of consent and the unacceptable rates of attrition and conviction for rape and other sexual offences.

1.6 Attrition and Conviction Rates

Attrition occurs at various stages of the criminal justice system's processing of rape cases. The victim may choose not to report the assault to police, the police may decide against pressing charges, the victim may withdraw from the process, the authorities may choose not to prosecute or, if the case proceeds to trial, the accused may be acquitted.⁴⁸ These multiple points of discontinuance have important implications for conviction rates for sexual offences. Different conventions exist for the measuring of conviction rates. They may be expressed as a percentage of all cases reported to police that result in a guilty outcome either by plea or by finding at trial, or they may be expressed as a percentage only of cases that proceed to prosecution. If the number of cases reported to police is used as the baseline then this may or may not include cases that are classified as unfounded or no-crime by police. Conviction rates are also affected by inconsistencies in legal frameworks, including the way that sexual offences are legally defined, and by limitations or differences in data-collection methodologies. Nevertheless, it seems clear that the various attrition points will exert a dampening effect on conviction rates, regardless of how they are calculated. Attempts to improve conviction rates have been directed by the understanding that the way that the legal notion of consent is constructed with the real rape stereotype as the frame of reference has a bearing on the high rates of attrition and low rates of conviction for sexual offences. It is difficult to gauge the true extent of rape victimisation although it is accepted that the figures for recorded rape

⁴⁶ See Ian Leader-Elliott and Ngaire Naffine, 'Wittgenstein, Rape Law and the Language Games of Consent' (2000) 26(1) *Monash University Law Review* 48; Gauthier, above n 42, 71. Smart, above n 33, 96–7.

⁴⁷ Brent Fisse, *Howard's Criminal Law* (Law Book Company, 5th ed, 1990) 178.

⁴⁸ Jennifer M Brown, Carys Hamilton and Darragh O'Neill, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors' (2007) 13(4) *Psychology, Crime & Law* 355; Liz Kelly, Jo Lovett and Linda Regan, Home Office Research, Development and Statistics Directorate, *A Gap or a Chasm? Attrition in Reported Rape Cases* (2005).

represent only a small proportion of actual incidents. Figures compiled by the Australian Institute of Criminology suggest that only 30% of incidents are reported to police and that only 1 in 10 of these reports results in a guilty finding.⁴⁹

Low rates of reporting are explained in various ways.⁵⁰ Studies confirm that women are more likely to experience sexual violence at the hands of an intimate partner or a known assailant than a stranger.⁵¹ In the domestic context the victim may be discouraged from reporting because of fear of retaliation, fear of being disbelieved by other family members, shame or fears for the wellbeing of any children.⁵² She may be financially dependent on her partner or retain hopes that the relationship can be salvaged. But the fact that her experience does not match the rape prototype may also influence her decision not to report. The incident may be distressing or degrading but she will not name the experience as rape and thus will not report it to police.⁵³ The influence of the real rape stereotype is evident, not only at the initial reporting stage, but at all the points of attrition in the criminal justice process. If the victim does report she may confront a ‘culture of scepticism’⁵⁴ amongst police officers who may be disinclined to believe allegations of forced sex without evidence of physical harm.

In deciding whether or not to proceed to trial, the prosecutor’s primary consideration is likely to be the prospects of conviction. Regardless of the complainant’s credibility, if the facts do not disclose a traditional rape scenario the prospects of conviction may be low and prosecutors may elect not to proceed with the case. If

⁴⁹ Taylor, above n 28. Statistical outcomes are clearly dependent on recording methodology, including the way the subject offence is defined. As the definition of rape expands to include more, non-traditional coercive sexual conduct, the relative percentage of incidents that are not reported (and thus not recorded) will increase. Recording rates are also not consistent across jurisdictions. England and Wales, for example, has experienced a continuing dramatic rise in recorded rape offences over the last few decades, although conviction rates remain relatively static; Temkin and Krahé, above n 35, 14–15. By comparison, Australia witnessed a substantial increase in reporting rates in the 1980s but current data suggests a decreasing trend; Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39 *Crime and Justice* 565, 581. Daly and Bouhours provide a comprehensive, inter-jurisdictional account of the criminal justice system’s response to rape, examining conviction and attrition rates and factors that may account for attrition at different points of the legal process.

⁵⁰ See Denise Lievore, Australian Institute of Criminology, *Non-Reporting and Hidden Recording of Sexual Assault: An International Literature Review* (2003).

⁵¹ Australian Bureau of Statistics 2010, above n 3; Jenny Mouzos and Tony Makkai, Australian Institute of Criminology, *Women’s Experiences Of Male Violence: Findings from the Australian Component of the International Violence Against Women Survey* (2004); Melanie Heenan, ‘Just “Keeping the Peace”: A Reluctance to Respond to Male Partner Sexual Violence’ (2004) 1 *ACSSA Issues* 1.

⁵² Heenan, above n 51, 15.

⁵³ See Zoë D Peterson and Charlene L Muehlenhard, ‘Was It Rape? The Function of Women’s Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences’ (2004) 51(3–4) *Sex Roles* 129; Arnold S Kahn, Virginia Andreoli Mathie, and Cyndee Torgler, ‘Rape Scripts and Rape Acknowledgment’ (1994) 18(1) *Psychology of Women Quarterly* 53.

⁵⁴ Kelly, Lovett and Regan, above n 48, 83.

criminal proceedings are instituted a significant percentage of defendants will plead not guilty and the case will go to trial.⁵⁵ The complainant knows that at trial she will be required to recount her experience of being violated in intimate detail before an often sceptical and disbelieving court and in the presence of her attacker. Her character will be maligned and she may be called a liar. Many women consider that it is not worth enduring the ordeal of a trial when there is very little likelihood of securing a conviction in any case.

Given the difficulties that the determination of the issue of consent can present for the court and the complainant in particular, it is not surprising that there have been attempts to criminalise coercive sexual conduct on grounds other than the absence of consent. Some of these are discussed in chapter 3 which looks at rape reform initiatives in other common law jurisdictions. However, the focus of this thesis is legislation that privileges absence of consent as the determinant of illicit sexual conduct. The next section of the chapter briefly looks at different legal perspectives on determining the issue of absence of consent.

1.7 Legal Approaches to Determining the Issue of Absence of Consent

The amended Tasmanian legislation exhibits features of the two conceptually distinct approaches to the determination of the issue of absence of consent that different courts and legislatures have endorsed. The traditional common law approach, exemplified in the Australian High Court case of *Papadimitropoulos*,⁵⁶ was to restrict the legal understanding of non-consent, such that the absence of consent could be established by only a limited number of coercive circumstances. In legal terms, there was no consent where submission was secured by threats of force or actual force, where the fraud of the accused induced a mistake as to the nature of the act or the identity of the perpetrator or where the victim lacked the capacity to consent. It was not open to a jury to find that consent was absent outside these narrow boundaries. An alternative approach was embraced by the United Kingdom Court of Appeal in *Olugboja*.⁵⁷ The court held that consent is a question of fact for the jury to determine by examining the complainant's subjective response to the sexual activity. The question is to be resolved, not by establishing the existence or otherwise of legally significant vitiating circumstances, but by considering whether the complainant consented in the sense that her acquiescence

⁵⁵ Taylor, above n 28, 2.

⁵⁶ *Papadimitropoulos v The Queen* (1957) 98 CLR 249.

⁵⁷ *R v Olugboja* [1982] 1 QB 320.

amounted to more than mere submission.⁵⁸ In that case, the court stated, ‘[the jury] should be directed that consent, or the absence of it, is to be given its ordinary meaning’,⁵⁹ although, in some circumstances, judicial elaboration on the difference between consent and mere submission may be called for. This represents a very different approach from that which the court endorsed in *Papadimitropoulos*. Although the decision in *Olugboja* arguably expands the scope of non-consent in trials of sexual offences it is potentially problematic. This approach provides no certainty about the legal notion of consent and it authorises the jury to use their own subjective understanding of consent to determine the issue at trial. It may therefore lead to inconsistency in the application of the legal rules relating to absence of consent in sexual offences and fail to exclude extra-legal discriminatory assumptions about consent from jury deliberations on the issue.

In the Tasmanian Criminal Code consent is defined in s 2A as ‘free agreement’.⁶⁰ The full text of s 2A reads:

2A. Consent

(1) In the Code, unless the contrary intention appears, ‘consent’ means free agreement.

(2) Without limiting the meaning of ‘free agreement’, and without limiting what may constitute ‘free agreement’ or ‘not free agreement’, a person does not freely agree to an act if the person –

- (a) does not say or do anything to communicate consent; or
- (b) agrees or submits because of force, or a reasonable fear of force, to him or her or to another person; or
- (c) agrees or submits because of a threat of any kind against him or her or against another person; or
- (d) agrees or submits because he or she or another person is unlawfully detained; or
- (e) agrees or submits because he or she is overborne by the nature or position of another person; or
- (f) agrees or submits because of the fraud of the accused; or
- (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused; or
- (h) is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required; or
- (i) is unable to understand the nature of the act.

(3) If a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is evidence of the lack of consent on the part of that person unless the contrary is shown.

Section 2A(2) provides a list of circumstances in which consent is presumptively absent, reflecting the approach taken in *Papadimitropoulos*, that absence of consent in the criminal law context is to be understood as a legal notion. Nevertheless, the provision also makes it clear that this list is not exhaustive, which suggests that there may be scope for the jury to apply their knowledge and experience of human behaviour to determine

⁵⁸ Ibid 332.

⁵⁹ Ibid.

⁶⁰ *Criminal Code* (Tas) s 2A (1): ‘In the Code, unless the contrary intention appears, “consent” means free agreement’.

that consent has been vitiated in other, non-enumerated circumstances. If the factual circumstances of the case or the nature of the inducement to consent do not fit one of the situations in s 2A(2) the jury will be left to decide whether the pressures exerted, in whatever form they may have taken, have prevailed upon the complainant to such an extent that she cannot be taken to have freely agreed. How influential the arguments in *Olugboja* should be in the context of s 2A of the Criminal Code and to what degree the jury can legitimately reason about the issue of consent from a lay perspective is very much a matter of debate. It is clear that the legislation is intended to set legal boundaries around deliberations on consent and that the enumerated circumstances in s 2A(2)(a)–(i) are intended to assist the jury in this exercise. It is less clear that those boundaries will be an effective prophylactic against juror reliance on prejudicial assumptions about rape victims.

1.8 History of the 2004 Reforms

The 2004 amendments had their genesis in the establishment in 1995 of a Tasmanian Government Task Force convened and chaired by the Office of the Status of Women to review, inter alia, the adequacy of the consent provisions located in section 2A of the Criminal Code, which had been inserted in the Code in 1987.⁶¹ The establishment of the Task Force on Sexual Assault and Rape in Tasmania and the fixing of its terms of reference was influenced by a number of roughly contemporaneous reports in Australia, notably *Heroines of Fortitude* from the New South Wales Department for Women,⁶² Bergen and Fishwick's, *Sexual Assault Law Reform: A National Perspective*⁶³ and the *Rape Law Reform Evaluation Project* prepared by the Victorian Department of Justice.⁶⁴

1.8.1 Previous Consent Provisions

Section 2A was inserted in the Code in 1987 and in its original incarnation it read:

2A (1) In the Code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.

(2) Without limiting the meaning that may otherwise be attributable to the expression 'freely given', a consent is freely given where –

- (a) it is not procured by force, fraud, or threats of any kind;
- (b) it is not procured by reason of the person being overborne by the nature or position of another person; or

⁶¹ *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) item 4.

⁶² Department for Women (NSW), above n 18.

⁶³ Jenny Bergen and Elaine Fishwick, Office of the Status of Women, *Sexual Assault Law Reform: A National Perspective* (1995).

⁶⁴ Department of Justice (Vic), *Rape Law Reform Evaluation Project* (1989).

(c) it is not given by a person so affected by liquor or drugs, or so otherwise affected, as to be incapable of forming a rational opinion upon the matter to which the consent is given.

(3) Where a person, against whom a crime is alleged to have been committed under chapters XIV or XX, suffers grievous bodily harm as a result of, or in connection with, such a crime, the grievous bodily harm so suffered is prima facie evidence of the lack of consent on the part of that person.⁶⁵

Section 2A departed from the earlier provision it had replaced by including an expanded list of circumstances which negated consent.⁶⁶ The new provision was intended to redirect the trial focus away from an evaluation of the accused's subjective interpretation of the complainant's behaviour. Instead, the accused's actions could be objectively assessed by reference to the enumerated circumstances of prima facie non-consent listed in s 2A. However, these reforms to the law of consent were essentially conservative in nature. The Tasmanian Government chose not to implement the Law Reform Commission's recommendation that a more extensive list of objective circumstances that would negate consent be introduced, reasoning that the proposed situations were covered by the broad definition of consent in s 2A in any case and that legislation in those terms would only serve to prolong trials.⁶⁷ The reforms did not provide a legislative definition of consent and left unchallenged the existing emphasis on capacity to consent. They also did not confront the problematic assumptions about consent that have persistently made proof of its absence so difficult.

A report considering the impact of these amendments prepared by the Task Force on Sexual Assault and Rape concluded that the objectives of the 1987 reforms had not been realised.⁶⁸ The findings were reinforced by Henning's subsequent research monitoring the operation of the 1987 reforms.⁶⁹ Commenting on the interim results of that study the Task Force stated:

- There is evidence that while some judges are trying to shift the conception of non-consent from active resistance to absence of positive consenting words or action, others have maintained a traditional approach. For this reason it is important that legislation mandate a new approach, couch consent in terms of positive free agreement and require the giving of mandatory directions by the Judge along the lines already provided for in such legislation as the *Crimes (Rape) Act 1991* (Vic); and,
- The unrealistic expectations of the courts for women and girls to attempt to fight off their attacker in inherently coercive or dangerous circumstances distorts the intention of the law and is a major barrier to reform. The

⁶⁵ *Criminal Code* (Tas) s 2A, inserted by *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) item 4.

⁶⁶ *Criminal Code* (Tas) s 2A (2), as amended by *Criminal Code Amendment (Sexual Offences) Act 1987* (Tas) item 4.

⁶⁷ Tasmania, *Parliamentary Debates*, House of Assembly, 15 April 1987, 1488–9 (John Bennett). See also the discussion in Henning, above n 5, 1–2.

⁶⁸ Task Force on Sexual Assault and Rape, above n 5, 29–31.

⁶⁹ Henning, above n 5.

vitiating circumstances listed in the legislation should be broadened to cover an increased range of 'predatory' conduct.⁷⁰

The Task Force delivered thirty-one recommendations covering the whole-of-system response to sexual assault and rape. Recommendations 13, 14 and 15 dealt with legal and legislative issues relating to consent.

As originally drafted, the Criminal Code Amendment (Consent) Bill 2003, which initiated the amendments that are the focus of this research, closely modelled these recommendations⁷¹ as well as those contained in Henning's report.⁷² The Bill adopted Henning's recommendations in relation to legislatively defining consent⁷³ and in relation to requiring, as a precondition to reliance on the defence of mistake, that reasonable steps are taken to ascertain consent.⁷⁴ A recommendation that the provision governing situations where the complainant is overborne by the nature or position of another person⁷⁵ be reworded along the lines of s 92P(h) of the *Crimes Act* of the Australian Capital Territory (ACT)⁷⁶ was not adopted. The *Crimes Act* provision states that consent is negated if it is caused 'by the abuse by the other person of his or her position of authority over, or professional or other trust in relation to, the person'.⁷⁷ In light of the narrow interpretation that courts had given the equivalent provision in Tasmania, Henning argued that a provision that followed the ACT model would clarify the situations where it could apply and would enable 'recognition of non-traditional constraints upon consent'.⁷⁸ However, the Bill essentially retained the original wording, and by implication affirmed the narrow interpretation of the provision. Arguably, in so doing, an opportunity was lost to further emphasise the fundamental change in the law of consent that the amendments were intended to effect.

The Bill was laid before Parliament in late 2003. In the second reading speech the Attorney-General explained that the driving force behind the reforms was a desire to radically overhaul the Tasmanian legislation in the way that the state of Victoria had done a decade before.⁷⁹ The Victorian reforms had replaced a traditional

⁷⁰ Task Force on Sexual Assault and Rape, above n 5, 30.

⁷¹ Ibid 8.

⁷² Henning, above n 5.

⁷³ Ibid 143.

⁷⁴ Ibid 149.

⁷⁵ Clause 2A(2)(d) in the original Bill. The provision appears as s2A(2)(e) of the Code as amended.

⁷⁶ Now s 67(1)(h).

⁷⁷ *Crimes Act 1900* (ACT) s 67(1)(h).

⁷⁸ Henning, above n 5, 111.

⁷⁹ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 45 (Judy Jackson, Attorney-General).

penetrative/coercive model of sexual relations with a communicative model of consent.⁸⁰ The Bill consisted of three parts. First, s 2A was to be amended to provide a statutory definition of consent and to expand the list of vitiating circumstances. Second, s 14A, dealing with mistaken belief in consent, would establish a statutory statement of the circumstances where, as a matter of law, a mistaken belief is not to be regarded as honest and reasonable for the purposes of the mistake defence provided for in s 14.⁸¹ And third, the Bill, as originally conceived, sought to make provision for mandatory judicial directions to juries in cases where consent was in issue in trials of sexual offences.⁸² Included in the proposed directions was a statement that,

[t]he fact that the complainant did not say or do anything to indicate that she or he was consenting to the sexual act which is the subject of the complaint is normally enough to indicate that she or he did not consent.⁸³

However, in its passage through Parliament, pursuit of this final reform was discontinued. Instead, a new s 2A(2)(a) was devised and introduced as a further amendment. It was thought that this move would obviate the need for mandatory jury directions, which were unpopular with the judiciary. (See discussion below).

1.9 Aims and Content of the Reforms

The passage of the *Criminal Code (Amendment) Consent Act 2004* effected amendments to two provisions of the Tasmanian Criminal Code, namely ss 2A and 14A. The amendments to s 2A, defining consent as ‘free agreement’ and providing additional examples of situations which would vitiate consent, sought to expand the scope of inducements that would negate consent beyond the traditional circumstances of force, fraud, threats and the victim’s incapacity to consent. Together with the amendments to s 14A the reforms aimed to establish a standard of mutuality as the gauge by which the existence and validity of consent was to be evaluated, a standard that it was hoped would displace misguided and prejudicial views about consent in the context of sexual relations.⁸⁴ The standard of mutuality in sexual relations imposes a shared obligation to

⁸⁰ Bernadette McSherry, ‘Legislating to Change Social Attitudes : The Significance of Section 37(a) of the *Victorian Crimes Act 1958*’ in P Eastal (ed), *Without Consent: Confronting Adult Sexual Violence* (Australian Institute of Criminology, 1993) 26.

⁸¹ Section 14 of the Code deals with mistake of fact in criminal proceedings. It reads: ‘Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence’.

⁸² Criminal Code Amendment (Consent) Bill 2003 (Tas).

⁸³ Ibid item 4.

⁸⁴ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

respect each other's sexual autonomy. Accordingly, the accused's conduct should also be examined to determine what actions he took to determine the existence of consent. The previous law emphasised capacity to consent. In contrast, the reforms focus on the existence of genuine agreement. This, it was thought, would promote an ideal of sexual relations that is characterised by reciprocity.⁸⁵ Section 2A (1) reads:

In the Code, unless the contrary intention appears, "consent" means free agreement.⁸⁶

The removal of references to the rational consenting subject represents a significant change from the pre-amendment version of s 2A:

In the Code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.⁸⁷

In the second reading speech on the Bill, the Attorney-General made it clear that it was intended that the new definition of consent would ensure that 'absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways.'⁸⁸

Section 2A(2) now contains a non-exhaustive list of circumstances in which, presumptively, there is no consent. Included in the list are the traditional, common law derived categories of force, fraud and mistake but, critically, the vitiating circumstances have been expanded to reinforce and strengthen the underlying philosophy of the amendments, namely, mutuality and reciprocity in sexual relations. Of most importance in this regard is subsection (2)(a) which establishes a communicative model for consent. It provides:

a person does not freely agree to an act if the person –
(a) does not say or do anything to communicate consent;⁸⁹

A clear distinction has therefore been created between valid, communicated consent and mere submission. More than any other aspect of the reforms, this section justifies the claim that the Tasmanian approach is truly radical. The Victorian *Crimes Act* includes a statement to similar effect but it appears in the form of mandatory jury directions.⁹⁰ No

⁸⁵ Ibid.

⁸⁶ *Criminal Code* (Tas) s 2A(1).

⁸⁷ *Criminal Code* (Tas) s 2A(1), as amended by *Criminal Code Amendment (Consent) Act 2004* (Tas) sch 1 item 4.

⁸⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

⁸⁹ *Criminal Code* (Tas) s 2A(2)(a).

⁹⁰ *Crimes Act 1958* (Vic) s 37(1)(a).

other jurisdiction provides such an unambiguous legislative expression of the implications of passivity for the determination of the element of absence of consent.

The amendments also inserted a new s 14A into the Code, dealing with mistaken belief in consent. This new provision further emphasises the importance of mutuality and communicated consent in sexual relations. It provides that a mistaken belief in consent is neither honest nor reasonable (as required by s 14) where the defendant,

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.⁹¹

In essence, s 14A aims to distribute responsibility for confirming whether or not sexual conduct is consensual evenly between the parties and, in concert with s 2A, to preclude an accused's reliance on prejudicial assumptions about female sexuality to justify a mistaken belief in consent.

1.9.1 Statutory Definition of Consent – Section 2A(1)

The professed aims of the government in statutorily defining consent as 'free agreement' were to establish a positive consent standard and clarify the notion of consent in the legal context.⁹² The insistence on affirmative consent marks a significant change in the law of rape. Previous laws that had only criminalised coerced sex that was procured by force, or by fraud in a very restricted sense, permitted sexual access to women in other circumstances where consent had not been granted. In contrast, a positive consent standard seeks to protect women's sexual agency, affirming their right to choose when to engage in sex and with whom. Describing the legal limits of the concept, it was thought, would address the difficulties that the fluidity of the notion of consent poses in the sexual offences context and ensure that deliberations on the element of absence of consent would be anchored to the legal construction of consent rather than the jury's extra-legal understanding of consent. Juror uncertainty about the boundaries of the legal notion of consent has been identified as an obstacle to convictions in rape cases.⁹³

A positive consent standard enables the prosecution to discharge its onus of proof in relation to the ingredient of absence of consent by establishing that there is no evidence of an affirmative indication of consent. This is made explicit by s 2A(2)(a): 'a person does not freely agree to an act if the person does not say or do anything to

⁹¹ *Criminal Code* (Tas) s 14A(1).

⁹² Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

⁹³ A recent Australian Institute of Criminology study confirms that juries struggle to understand the meaning of consent in sexual offences cases: Taylor, above n 28.

communicate consent'.⁹⁴ A positive consent standard thus limits recourse to the traditional model of sexual relations. McSherry explains the traditional view, with its myopic concern with the act of penetration, thus: '[W]omen are viewed as submissive, as acquiescing to sexual intercourse *unless* they resist in some way'.⁹⁵ Section 2A was enacted to shift the trial focus away from the need to adduce evidence of injury, weapons or other proof of violence, which can limit the boundaries of rape and exclude coerced sex that does not fit the accepted, narrowly confined paradigm. There has been opposition to the adoption of a statutory definition of consent, which tends to rely on one of two arguments: either that such a move unnecessarily confines the common law understanding of the concept or, alternatively, that it could result in an unacceptably broad interpretation. For example, does 'free agreement' mean that consent given in response to *any* form of persuasion or coercion, no matter how trivial, is not a valid consent?⁹⁶ The idea that very minor inducements will invalidate consent is clearly unsupportable and moreover, given that the existence of consent is ultimately a question of fact to be determined by the jury, the persistence of cultural attitudes as outlined above suggests such an outcome is virtually unimaginable. Therefore, criticism of a statutory definition on this basis is unfounded.

The inclusion of s 2A in the Criminal Code was designed to achieve a redistribution of responsibility for establishing whether proposed sexual contact is mutually desired, that is, to promote the ideal of communicative sexuality as the model of normative sex.

1.9.1.1 Communicative Sexuality

The notion of communicative sexuality has been closely associated with feminist philosopher, Lois Pineau. For Pineau it is not the presence of consent, per se, that legitimises sexual relations but the presence of ongoing, mutual communication throughout the encounter that signals voluntary, uncoerced agreement. As she explains:

[I]f a man wants to be sure that he is not forcing himself on a woman, he has an obligation either to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment.⁹⁷

⁹⁴ *Criminal Code* (Tas) s 2A(2)(a).

⁹⁵ McSherry, above n 80, 28.

⁹⁶ The competing arguments were canvassed during the review process leading to the repeal of section 61R of the *Crimes Act 1900* (NSW) and its replacement with the new section 61HA. See NSW Attorney General's Department, Criminal Law Review Division, *The Law of Consent and Sexual Assault: Discussion Paper* (May 2007).

⁹⁷ Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, 234.

The standard of mutuality also informs Chamallas' exemplar of sexual relations. She interprets modern legal developments in the regulation of sexual conduct as a drive towards the substitution of mutuality for consent as the central criterion for distinguishing between rape and not rape. Although speaking in the specific context of sexual harassment she suggests that in the context of rape too, mutuality can be gauged by asking

whether the target would have initiated the encounter if she had been given the choice. If we answer the question in the affirmative, there is some assurance of mutuality in the sexual encounter.⁹⁸

Chamallas traces a progressive development of three philosophical perspectives on sexual conduct, which culminate in her version of communicative sexuality as the final, and, by implication, the most enlightened of these.⁹⁹ Chamallas' third view, the feminist or 'egalitarian' view of sexual conduct, grew out of the feminist critique of the liberal view of sexual conduct and its failure to address the operating circumstances within which consent is procured. It is this view which corresponds to Pineau's notion of communicative sexuality. For Chamallas, 'the fundamental animating concern [of the egalitarian view] is fostering equality between the sexes'.¹⁰⁰ Legitimate sexual conduct, no matter how it may actually be manifest, necessarily demands the mutual, unfettered consent of the parties. The amended Tasmanian consent provisions embody this aspiration in defining consent as 'free agreement'. These amendments re-imagine the complainant as an autonomous entity whose sexual choices are to be respected and whose lack of articulated agreement or articulated non-consent is not to be interpreted as agreement or consent by recourse to unjustified preconceptions about female sexuality.

⁹⁸ Chamallas, above n 45, 836.

⁹⁹ Ibid. The first of these is the traditional view, rooted in religious imperatives regarding the exclusively procreative purpose of sex, which sanctions only sexual conduct within marriage. Thus, the lawfulness of sexual conduct is judged according to the status of the participants: at 781. It encompasses a heavily moralistic view of sexual relations, even to the extent that women seeking redress through the law for sexual violations are themselves tainted by association and thus denied the law's protections: at 789–90. The second is the liberal view. This position views sex as a matter of private morality and as such the government has no authority to regulate sexual activity between consenting adults. The state is only entitled to impose sanctions where consent is absent. Feminists have critiqued the liberal privileging of consent as the determinant of legitimate sexual conduct, maintaining that the legal notion of consent is defined too narrowly and fails to take into account the fundamental power imbalance that exists in relations between men and women: Naffine, *Feminism & Criminology*, above n 31, 109–110. The liberal view postulates the woman as an autonomous sexual being who, in all except cases of violent force, is able to grant or withhold her consent to intercourse freely. It fails to recognise that ostensible consent may be no more than a capitulation to pressures that are no less irresistible for all that they are not physical. See Sharon Cowan, 'Freedom and Capacity to Make a Choice: A Feminist Analysis of Consent in the Criminal Law of Rape' in V E Munro and C F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 51, 55; Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998) 117; MacKinnon, above n 33, 175.

¹⁰⁰ Chamallas, above n 45, 783.

An attempt is made to undermine the influence of traditional rape stereotypes by the inclusion in s 2A(2) of both a requirement of communicated consent and an expanded list of circumstances presumed to vitiate consent.

The model of communicated consent is not without its detractors. Central to this model is the requirement of affirmative communication of continuing consent to engage in sexual conduct. As noted above (at 1.5.1), for a variety of reasons agreement in sexual encounters is typically communicated, if at all, by subtle and ambiguous signals. Therefore, critics argue that the imposition of a positive consent standard, which directs that silence or ambiguous conduct do not constitute consent, does not reflect how individuals behave in intimate encounters. Subotnik argues that in fact one sure-fire way to ensure that sex does not take place is to engage in explicit, and uncomfortable, pre-coital discussion about the acts proposed.¹⁰¹ This criticism fails to recognise that the question of whether or not it is unreasonable or unrealistic to expect positive signals of consent is very much context dependent. For example, situations where the participants do not share a history of consensual intimate encounters, or where there is evidence that the other person is heavily intoxicated or even asleep, or where aggravating factors such as violence or a considerable power imbalance exist may be contrasted with sexual activity that occurs between long-term, mutually respectful partners. In the former it may be quite reasonable to require that a man seek unambiguous signals of consent whereas in the latter such a requirement may unjustifiably impose 'a degree of formality and artificiality ... [where] spontaneity is especially important'.¹⁰²

Subotnik also disputes the underlying premise of a positive consent standard, that is, that silence cannot be construed as consent, because for a variety of reasons women are not necessarily empowered to express dissent.¹⁰³ However, whilst his claim that contemporary women are no longer handicapped by the political, social and economic gender inequalities of the past¹⁰⁴ may hold true for some, it is not true for all women. What is more, it is precisely in those situations where the existence of coercive factors prevents the victim from rejecting or avoiding sex that claims of forced sex are most likely to arise and where the insistence on an affirmative consent standard is likely to assist the complainant in a way that a resistance standard cannot.

The other major criticism of the communicative consent model is that, on its own, it does not resolve the question of how valid consent is recognised. It does not

¹⁰¹ Dan Subotnik, 'Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy' (2008) 41 *Akron Law Review* 847, 863.

¹⁰² Stephen Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of the Law* (Harvard University Press, 1998) 272.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

establish what, if any, coercive pressure will be sufficient to invalidate ostensible assent to particular sexual acts. For example, using the language of the Tasmanian legislation, does a woman's agreement to engage in sex in circumstances where a degree of economic pressure has been applied still amount to consent? Subotnik also points out that just because consent is express does not ensure that it is freely given.¹⁰⁵ It is submitted that these criticisms are addressed in part by the interaction of the different features of the consent provisions in the Code. Defining consent as free agreement establishes that the principles of sexual autonomy and independent choice must guide the jury in their deliberations on the issue of consent. The affirmative consent standard dictates that the notions of mutuality and reciprocity must also inform that task, and the expanded list of circumstances that vitiate consent map out the limits of the notion of 'free agreement' and hence the notion of consent in the legal context. The cumulative effect should be to invest the legal notion of consent with a more robust framework and reduce the risk that extra-legal assumptions to dictate the outcome of jury deliberations.

1.9.2 Expanded Vitiating Circumstances – Section 2A(2)

The amended section 2A now specifies a total of nine circumstances which, prima facie, will vitiate consent. Whilst some of these circumstances are familiar from the earlier version of s 2A, at least two are unprecedented. Section 2A(2)(a) provides that there is no free agreement where the other party does not communicate consent either by words or actions. The inclusion of this provision reinforces the definition of consent as 'free agreement'. It constitutes a direct attack on the traditional, orthodox view that mere submission can be equated with consent. Where submission is equated with consent the danger is that only forceful resistance will be accepted as adequate communication of non-consent to the attacker.¹⁰⁶ This in turn may result in the exclusion of women whose resistance is passive, timid or diffident from the law's protection. This is despite the fact that active resistance is not necessarily or even commonly the natural response to a sexual assault and that many victims feel unable to resist when confronted with the threat of serious physical harm.¹⁰⁷

¹⁰⁵ Ibid 857–8.

¹⁰⁶ See for example, Denise Lievore, Australian Government Office of the Status of Women, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004). This study, an analysis of prosecutorial decisions in five Australian jurisdictions, revealed that convictions were considered more likely and thus cases were more likely to proceed where there was evidence of forceful resistance or injury. See also Brown, Hamilton and O'Neill, above n 48; Henning, above n 5.

¹⁰⁷ Australian Bureau of Statistics 2004, *Sexual Assault in Australia: A Statistical Overview*, cat no 4523.0, ABS, Canberra. The ABS statistics show that only 30% of victims of sexual assault were physically injured in the most recent incident suggesting that many victims may employ strategies to reduce the risk of physical harm.

The other sub-section that marks a departure from the former s 2A is paragraph (d), which provides that unlawful detention will vitiate consent. This section did not appear in the previous legislation. As was the case prior to the 2004 amendments, consent that is procured as a result of force, fraud or threats continues to be considered invalid, however these concepts have been expanded and defined in somewhat more detail. The original relevant paragraphs of 2A read:

- (2) Without limiting the meaning that may otherwise be attributable to the expression 'freely given', a consent is freely given where —
 (a) it is not procured by force, fraud, or threats of any kind;¹⁰⁸

These three elements are now dealt with in separate sub-sections. 'Force' has been extended to include 'a reasonable *fear* of force' (emphasis added), which recognises that women may submit to sex in an effort to avoid other forms of violence. The Bill in its original form did not include the word 'reasonable' but changes effected in its passage through the Upper House of the Tasmanian Parliament added this qualification. (See discussion below). It is significant that the amended s 2A contains two separate provisions governing the effect of fraud and mistake on consent. At common law, the scope of fraud that will vitiate consent is narrowly confined. It is limited to fraud as to the identity of the perpetrator or as to the character of the act.¹⁰⁹ Prior to 2004 the relevant section of 2A provided little guidance on the scope of fraud under the Code. The correct interpretation of the provision was unclear owing to a conflict of judicial authority between Crisp J's judgment in *Schell*¹¹⁰ that only the common law categories of fraud could vitiate consent (applying the High Court decision in *Papadimitropoulos*) and the much wider view of fraud apparently endorsed by Gibson J in *Hurst*.¹¹¹ The 1987 amendments failed to resolve this conflict but the contrast presented by the 2004 amendments suggests that Gibson J's view would now prevail. Relevantly, the new section reads:

- (2) Without limiting the meaning of 'free agreement', and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person —
 ...
 (f) agrees or submits because of the fraud of the accused; or
 (g) is reasonably mistaken about the nature or purpose of the act or the identity of the accused;¹¹²

¹⁰⁸ *Criminal Code* (Tas) s 2A(2)(a), as amended by *Criminal Code Amendment (Consent) Act 2004* (Tas) sch 1 item 4.

¹⁰⁹ See *Papadimitropoulos v R* (1957) 98 CLR 249; *Woolley v Fitzgerald* [1969] Tas SR 65; *Williams* [1923] 1 KB 340 CCA; *Dee* (1884) 15 Cox CC 579.

¹¹⁰ *R v Schell* [1964] Tas SR 184.

¹¹¹ *R v Hurst* (Unreported, Supreme Court of Tasmania, Gibson J, 8 June 1960).

¹¹² *Criminal Code* (Tas) s 2A(2).

In specifically providing in paragraph (g) for cases where consent is given due to a mistake as to the nature or purpose of the act or the identity of the perpetrator the legislature has signalled that fraud in paragraph (f) is not to be narrowly interpreted. The final traditional category, consent procured by threats, has been remodelled and it is now made explicit that the threats may be made against the complainant or any other person.

The language of s 2A underlines its insistence on mutuality rather than capacity. The phrase ‘agrees or submits’ is used repeatedly in preference to ‘procured by’. Additionally, paragraph (i), which carries echoes of the old requirement that consent be given by a ‘rational person...able to form a rational opinion’¹¹³ now encompasses a much more subjective test of understanding. It refers to the subjective ‘ability’ to understand the nature of the act rather than the objective ‘capacity’ to understand.

1.9.3 Mistaken Belief in Consent – Section 14A

The other major component of the 2004 reforms was the insertion of s 14A relating to mistake as to consent in sexual offences. Following the Tasmanian case of *Snow*¹¹⁴ an honest and reasonable but mistaken belief in consent is a defence to a charge of rape. This was subsequently confirmed in *Arnol*.¹¹⁵ Mistaken belief in consent is particularly important in Code jurisdictions like Tasmania where the mental element for the offence of rape is limited to a requirement that the act of sexual intercourse be voluntary and intentional.¹¹⁶ Mistake as to consent is therefore not a denial of the mental element but depends on the general exculpatory defence of honest and reasonable mistake regarding an external element of the crime, that is, that the complainant was not consenting. The general mistake defence is contained in s 14 of the Tasmanian Criminal Code:

14. Mistake of fact

Whether criminal responsibility is entailed by an act or omission done or made under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.

Although the section requires that the mistake be both honest *and* reasonable and that, strictly speaking, the defence should only be left to the jury where there is an evidentiary foundation for it, it appeared that judges were allowing the defence almost as a matter of course. An illustrative case is *Parker*.¹¹⁷ The defendant in that case was acquitted of a charge of rape, presumably because the jury accepted his claim that he believed the

¹¹³ *Criminal Code* (Tas) s 2A(1), as amended by *Criminal Code Amendment (Consent) Act 2004* (Tas) sch 1 item 4.

¹¹⁴ *Snow v The Queen* [1962] Tas SR 271.

¹¹⁵ *Arnol v The Queen* [1981] Tas R 157. See also *Bennett v R* [1991] Tas R 11.

¹¹⁶ *Criminal Code* (Tas) s 13.

¹¹⁷ *Parker v The Queen* [1994] TASCRA A57 (21 July 1994).

complainant was consenting. The defence of honest and reasonable mistake of fact was left to the jury despite the fact that intercourse had taken place in circumstances where the defendant had violently forced his way into the house, assaulted his former partner and threatened her with a loaded shotgun. The insertion of s 14A was an attempt to set some limits to what might, as a matter of law, constitute a reasonable belief. The Deputy Leader of the Government in the Legislative Council, Doug Parkinson, explained:

The ... amendment deals with the defence of mistaken belief of consent on the part of the accused. While the current defence of mistaken belief requires the accused to have been 'honestly' and 'reasonably' mistaken as to the existence of consent, it is problematic because it allows an accused to base a defence on widely accepted, but untested, assumptions about the way people behave, particularly about the way women behave and about their sexual behaviour and desires.¹¹⁸

Section 14A provides that a mistaken belief in consent will not be reasonable in circumstances in which the accused was in a state of self-induced intoxication and the mistaken belief was attributable to that intoxication, or where the accused was reckless as to whether or not the complainant consented or did not take reasonable steps to ascertain that the complainant was consenting. It is questionable whether s 14A adds anything to the operation of s 14 since a belief in consent would not be reasonable in these circumstances in any case. It may be that it merely illustrates and emphasises the reasonableness requirement of s 14. On the other hand, s 14A may make the defence of mistake more demanding. The substance of the mistaken belief must be that the defendant believed that the victim communicated to him her free agreement to engage in sexual conduct, that is, the belief must be as to the existence of consent as legally defined in s 2A of the Code.¹¹⁹ If the belief rests on sexist assumptions about female behaviour it should have no exculpatory effect since it amounts to a mistake of law. Correctly applied, s 14 should preclude the defence in such circumstances, however it is by no means clear that this is the case.¹²⁰ Placing an obligation on the defendant to explain the reasonable steps he took to ascertain the existence of consent provides an additional obstacle to him benefiting from his ignorance about the legal notion of consent. Merely asserting a belief in consent that is said to be honest and reasonable is not enough. Section 14A requires the defendant to take positive action to ascertain consent.¹²¹

¹¹⁸ Tasmania, *Parliamentary Debates*, Legislative Council, 18 November 2004, 30–65 (Doug Parkinson).

¹¹⁹ *Dalwood v The Queen* (Unreported, Court of Criminal Appeal Tasmania, Burbury CJ, Crisp and Crawford JJ, 22 December 1967).

¹²⁰ See Lucinda Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea' (1987–88) 2 *Canadian Journal of Women and the Law* 233; Sheehy, Elizabeth (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012).

¹²¹ Vandervort, above n 120, 295–300.

1.10 Changes to the Original Bill

The Bill passed the House of Assembly as tabled but it was partially redrafted in the Upper House and some significant amendments introduced. The words ‘reasonable fear of force’ replaced ‘fear of force’ in s 2A(2)(b), ‘misrepresentation’ was removed as a vitiating circumstance in (2)(e) leaving only ‘fraud’, the words ‘reasonably mistaken’ replaced ‘mistaken’ in (2)(f), the word ‘incapable’ was omitted in (2)(h) and substituted with the word ‘unable’ and an additional paragraph, (2)(a), ‘does not say or do anything to communicate consent’ was inserted. Critics of the original draft argued that it adopted a wholly subjective approach to the assessment of the complainant’s mental state and left no place for a consideration of the reasonableness of the fear of force or whether that fear might reasonably be apprehended by the accused.¹²² It was claimed that this risked a flood of trivial or absurd charges. However, as Blackwood and Warner correctly point out, whilst the objective reasonableness of the complainant’s belief about her freedom to withhold consent may be a factor in the jury’s assessment of the truth of her claim of forced sexual intercourse, whether as a matter of fact she was consenting or whether her belief in the existence of serious threats induced her to consent is ‘necessarily a wholly subjective test’.¹²³ The objections to a subjective test also suggest an endorsement of those views about allegations of sexual assault that the Bill sought to remove, that is, that rape complainants form a category of unreliable witnesses and that false rape allegations are not uncommon.

One final change was made to the original Bill. On the basis of advice received from a working party set up to redraft the original Bill,¹²⁴ the Bill was amended to remove the mandatory jury directions contained in clause 4(c). It was felt that the purpose in requiring such directions would be better served by relying on the changes within the body of the Bill itself. It was suggested that the need for mandatory directions would be obviated by the insertion of s 2A(2)(a) and that the text of the legislation was sufficient in itself to inform the jury about the legal notion of consent. Reluctance to add to the plethora of mandatory directions in sexual offences cases is perhaps understandable. Numerous directions are already required in sexual offences cases.¹²⁵ Additional

¹²² See Tasmania, *Parliamentary Debates*, Legislative Council, 18 November 2004, 71 (Jim Wilkinson).

¹²³ John Blackwood and Catherine Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press, 2006) 669.

¹²⁴ See Tasmania, *Parliamentary Debates*, House of Assembly, 25 November 2004, 51 (Judy Jackson, Attorney-General).

¹²⁵ For example, s 371A of the *Criminal Code* stipulates that a direction must be given in relation to the victim’s failure to make a timely complaint in any case where it is suggested that there has been absence or delay. The direction should inform the jury that delay does not necessarily indicate that the allegation is false and that there may be good reasons for the delay. It is likely

warnings would increase the length and complexity of summing up, increase the risk that the summing up may include matters that are not strictly relevant to the trial and may serve merely to confuse the jury. The great danger is that this increases the potential that the verdict will be appealed. A study of appeals cases in New South Wales confirmed that the inadequacy of judicial directions provides fertile grounds for appeal.¹²⁶ The study found:

55.5 per cent of ... sexual assault conviction appeals concern[ed] grounds of appeal based upon submissions that argued that the trial judge had given an inadequate or incorrect judicial direction and or warning.¹²⁷

The burden of additional mandatory directions may further jeopardise the already difficult task of composing a summing up that is both useful to the jury as a guide to their deliberations and not vulnerable to appeal. It is argued that the decision to replace mandatory jury directions with a legislative prescription was well advised as s 2A(2)(a) represents a much stronger legal statement of the effect of evidence of passivity on the determination of the issue of absence of consent.

1.11 Efficacy of Legal Reform

The intention of the Tasmanian Parliament in defining consent as ‘free agreement’ was to address the fluidity that plagues the concept of consent to sexual conduct. It must be recognised at the outset, however, that the statutory definition is itself a subjective concept. In a sense the question is merely recast so that jurors’ preconceptions will operate, not on the concept of ‘consent’, but on the concept of ‘free’. Free agreement to

that many cases will be caught by this provision. The authors of the *Heroines of Fortitude* report found that delay in complaint was raised by the defence in 50% of cases where the assault was reported within five hours: Department for Women (NSW), above n 18, 208. Under s 165B of the *Evidence Act 2001* (Tas), in cases where there has been a delay in prosecution, a defendant may seek that the jury be directed in relation to the forensic disadvantage suffered by the defendant as a result of the delay and the need for the jury to take that disadvantage into consideration. This section abolishes the common law *Longman* direction. The *Longman* warning which ‘directs the jury as to the dangers of convicting on the complainant’s evidence alone ... is to be given “whenever necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case”’: Tasmanian Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006) 4, citing *R v Longman* (1989) 168 CLR 79, 91 (Brennan, Dawson and Toohey JJ). The common law *Croft* direction is preserved by the general statement of the trial judge’s power to direct the jury in s 165(5) of the *Evidence Act 2001* (Tas): ‘This section does not affect any other power of the judge to give a warning to, or to inform, the jury’. The *Crofts* direction ‘requires the trial judge to give a “balancing direction” to the direction required by such provisions as s 371A *Criminal Code* (Tas) and to inform the jury that delay in complaining may affect the credibility of the complainant’s account’: Tasmanian Law Reform Institute, above n 125. This report also gives a more extensive list of directions that may be required in sexual offences cases: at 12–13.

¹²⁶ Dorne J Boniface, ‘The Common Sense of Jurors v The Wisdom of the Law: Judicial Directions and Warnings in Sexual Assault Trials’ (2005) 28(1) *University of New South Wales Law Journal* 261.

¹²⁷ *Ibid* 263.

participate in sexual relations is only meaningful where both parties have the freedom and capacity to make a choice. Given that all choices are contingent or compromised in some way, whether, in the eyes of the jury, the complainant freely agreed to sex depends on what sorts of compromises they consider an agreement can sustain before it is no longer free. The enumeration in s 2A of specific circumstances where a presumption of non-consent will arise is an attempt to set limits to the legal concept of free agreement but, necessarily, the list is not exhaustive and room still exists for the intrusion of unarticulated and untested assumptions about rape and complainants in sexual offences. The success of these reforms, therefore, may be heavily dependent on the resilience of those assumptions and the willingness of the triers of fact to relinquish them. It may be that simply changing the words of the statute will not be sufficient to dismantle them. The effectiveness of statutory reform when unaccompanied by other reform initiatives is often called into question with critics arguing that its value is largely symbolic. Others have considered whether one response to the difficulties of rape reform might be to entirely abandon efforts to effect change through reform of rape statutes. Liberal feminist's faith in the blunt instrument of statutory change has been criticised for failing to acknowledge the reality that legal principles and legislative definitions are derived from a male perspective and that masculine notions of consent and freedom do not account for the social, economic, political and physical gender power imbalances that 'shape women's consent'.¹²⁸ Smart argues that the criminal law is the wrong arena in which to grapple with the problems of rape and sexual assault. She claims: 'in resorting to law, especially law structured on patriarchal precedents, women risk invoking a power that will work against them rather than for them.'¹²⁹ Her dismissal of the law as an instrument of change is emphatic: 'It is glaringly obvious that the criminal law does not provide a remedy to sexual abuse, it is increasingly obvious that it causes harm, yet still it is assumed that the solution is to encourage more women and children into the system.'¹³⁰

The literature tends to confirm that rape law reform has had minimal impact on outcomes in sexual offences cases.¹³¹ Although, for a variety of reasons,¹³² the past decades have seen marked increases in recorded offences in most major common law jurisdictions, recent inter-jurisdictional research by Daly and Bouhours confirms that

¹²⁸ Vanessa Laird, 'Reflections on *R v R*' (1992) 55(3) *Modern Law Review* 386, 392.

Mackinnon's important contribution to feminist legal theory in this area must also not be overlooked. See, eg, MacKinnon, above n 33.

¹²⁹ Smart, above n 33, 138.

¹³⁰ Ibid 161.

¹³¹ See Daly and Bouhours, above n 49, 9 and the studies referenced therein.

¹³² These may include the introduction of an expanded definition of rape, improved police recording practices and a greater willingness to report due to increased confidence that complaints will be handled with sensitivity by police.

numbers of convictions as a percentage of reported rapes have declined significantly in Australia, Canada and England /Wales.¹³³ Their analysis of 75 studies investigating the handling of sexual offences in common law jurisdictions reveals that conviction rates in Australia have declined from 17 to 11.5 per cent and those in Canada have declined from 26.5 to 14 per cent.¹³⁴ In England/Wales where the number of convictions for sexual offences displays a continuing upwards trend, as a percentage of reported cases overall convictions have declined dramatically.¹³⁵ Patterns of attrition differ across jurisdictions and reductions in overall conviction rates may variously be due to a decrease in the proportion of cases proceeding past the police report stage, a decrease in the proportion of cases proceeding to trial or a decrease in conviction rates at trial. It is clear, therefore, that merely encouraging more women to report sexual abuse will not guarantee that more offenders who deserve punishment are convicted. Unless the criminal justice process also changes the manner in which sexual offences cases are prosecuted and finds ways to negate the unwarranted influence of stereotypes about rape, its victims and its perpetrators, it is likely that convictions in non-traditional cases will remain elusive.

1.12 Summary

Chapter 1 provides an outline of this research into the implementation of the 2004 reforms to the Tasmanian Criminal Code and maps out the course that the thesis takes in the ensuing chapters. It examines the problematic nature of consent to sexual activity and describes the context in which the Tasmanian reforms arose. It explains how the legislative changes were shaped by an awareness that assumptions about the nature of female consent and distrust of victims of rape are continuing obstacles to convictions in rape cases. The Tasmanian reforms are part of a modern trend in rape law reform to explain absence of consent, as an ingredient of the offence of rape and other sexual offences, in terms of a denial of sexual autonomy. However, the influence of the historical position, that only force, fraud or victim incapacity will negate consent is still apparent and is implicated in the difficulties that consent continues to present for the successful prosecution of sexual offences cases. The first step in dismantling this edifice of questionable assumptions and prejudices is to work out how they came to be integral to the evaluation of the credibility of the complainant's account of violation and the assessment of the defendant's culpability for particular sexual conduct. Accordingly, in an effort to make sense of the long-standing and persistent scepticism with which claims

¹³³ Daly and Bouhours, above n 49.

¹³⁴ Ibid 22–4. The authors conducted a comparative analysis of conviction rates over two time periods, 1970–89 and 1990–2005.

¹³⁵ See Kelly, Lovett and Regan, above n 48, 25.

of coerced sex are viewed, chapter 2 examines the historical understanding of rape and in particular the element of absence of consent and how it has been accommodated and interpreted in the common law system. It highlights those aspects of the real rape scenario that are germane to this thesis and investigates the reasons why they first gained acceptance and how they were maintained by legislative acts and judicial statements. It argues that aspects of the traditional view of rape are explained by the legal context from which they emerged and by the prevailing social and cultural environment. These bygone attitudes are greatly at odds with contemporary notions of gendered sexuality and therefore inherited justifications for the way that the offence is defined and the way it is prosecuted are no longer valid. Nevertheless, these prejudices continue to influence the conduct of sexual offences cases and historical understandings of female social roles and female sexuality are manifest in substantive and procedural aspects of the modern law of rape. The chapter acknowledges that traditional attitudes may prove very difficult to unseat but argues that an important step in debunking the myths is to expose their foundations in a conception of coerced sex that cannot accommodate the contemporary notions of sexual autonomy and communicative sexuality that animate the Tasmanian reforms.

Chapter 2: An Historical Account of Rape Myths

2.1 Introduction

The continued interest in the way that rape laws are structured and the persistent calls for reform are sustained by aspirations to encourage more victims to report by improving the criminal justice experience for victims, to ensure that more offenders who deserve punishment are convicted and to change attitudes to these offences at trial. At a broader level there is a desire to alter what is regarded as consensual sex, and to renounce the exploitation of women and increase their sexual autonomy. As explained in chapter 1, achieving a reconfiguration of the crime of rape and encouraging greater rates of reporting is likely to also secure improved rates of conviction. The most convincing arguments for change are those that expose the flaws in the existing legislative scheme as a step towards establishing a more legitimate basis on which to make new laws. This chapter looks back to the formative years of legislative sanctions against rape and suggests that the way they were structured and implemented may be explained by prevailing misogynistic socio-cultural understandings about appropriate female roles and the nature of male and female sexuality. It argues that, although these antiquated attitudes are no longer generally credited, their influence is discernible in some aspects of modern sexual offences law and court practices that continue to discriminate against female rape complainants. It is the failure of the law, and those who implement it, to address the unwarranted influence of prejudicial assumptions and to confirm by their practices that they have no place in the criminal trial that accounts for the legal system's failure to protect women adequately from unwanted sex.

Chapter 1 examined the problematic nature of consent in trials of sexual offences and the way that prejudicial assumptions about the nature of rape and genuine victim characteristics sabotage the law's ostensible role as a guardian of women's sexual autonomy. If only the most egregious forms of coercion are punished then in many cases the law is effectively granting sexual access to women irrespective of their subjective wishes.¹³⁶ If any attempt is to be made to debunk these beliefs about rape it is important to examine the social context within which they developed. By exploring the constituents of the historical offence of rape the continuing contemporary adherence to rape myths is uncovered and brought into question. If we understand how conventional rape

¹³⁶ See, eg, Stephen Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35. Schulhofer claims: 'Rather than asking whether male conduct is abusive and unwarranted, the law in effect asks only whether conduct is so bad that it is equivalent to forcible rape. Core rights of the person to physical autonomy and to freedom of choice in matters of sexual intimacy are devalued or obscured as a result': at 93–4.

stereotypes arose we may be able to explain their persistence through centuries of change in the law of rape and gendered attitudes about social roles and sexuality. We may be able to show that there is no longer a reasoned explanation for continuing to give credence to the myths about rape. But perhaps most importantly we can expose the law's complicity in their continued operation and direct reform efforts at dismantling those aspects of legal culture that deny justice to female complainants. The persistence of rape stereotypes may be partly explained by their venerability but it is also due to court practices that tacitly condone and sustain them. Prejudicial notions of female chastity and genuine victimhood, for example, persist in the sexual offence trial and are manifested in the cross-examination of complainants about their sexual history and reputation and in the way that the court countenances defence insinuations that victims are to blame for their violation. Likewise, the belief that women are prone to lie and thus constitute a class of inherently unreliable witnesses underpins the comparatively recently abolished common law requirement that judges in sexual offences matters must warn juries against convicting solely on the basis of the uncorroborated testimony of the female complainant. The fact that modern-day parliaments have found it necessary to legislate to restrict cross-examination on sexual history and sexual reputation¹³⁷ and to abolish mandatory corroboration warnings¹³⁸ indicates that rape myths remain a contemporary problem in the trial. Further proof that prejudicial assumptions continue to exert an influence on rape cases is that prosecutorial assessments of the prospects for conviction, and thus decisions about whether or not to proceed with prosecution, reflect a belief that cases in which the factual scenario aligns with the prototypical rape are more likely to be successfully

¹³⁷ For example, all Australian states and territories have introduced rape shield legislation: *Crimes Act 1914* (Cth) ss 15YB–YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2001* (Tas) s 194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Evidence Act 1929* (SA) s 34I; *Evidence Act 1958* (Vic) s 37A; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

¹³⁸ Mandatory corroboration warnings in sexual offences cases were abolished in New South Wales by the *Crimes (Sexual Assault) Amendment Act 1981* sch 1 item 14. The abolition is now contained in the *Evidence Act 1995* (NSW) s 164(3). All Australian states and territories have since followed suit. See *Evidence Act 1995* (Cth) s 164(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Criminal Code* (Qld) s 632(2); *Evidence Act 2001* (Tas) s 164, which applies generally and *Criminal Code* (Tas) s 136, which applies only in sexual offences trials; *Crimes Act 1958* (Vic) s 61; *Evidence Act 1906* (WA) s 50. The jurisdictions of South Australia and the Northern Territory have legislated only in relation to the evidence of children: *Evidence Act 1929* (SA) s 12A; *Evidence Act 1939* (NT) s 9C. In light of these statutory responses corroboration warnings in common law terms, which warn of the dangers of convicting on the basis of uncorroborated evidence alone, are no longer mandatory, but a jury may be still be cautioned in such terms if, in the exercise of judicial discretion, it is deemed necessary 'to avoid the perceptible risk of miscarriage arising from the circumstances of the case': *R v Longman* (1989) 168 CLR 79, 91. In Tasmania, judicial power to issue common law warnings is expressly retained by s 165(5) of the *Evidence Act 2001*: See Tasmanian Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report No 8 (2006) 1, 3–4.

prosecuted.¹³⁹ If the bulk of cases that are prosecuted conform to the rape stereotype this feeds an expectation that genuine allegations of rape will display those characteristics.

This chapter argues that, as the product of a particular historical understanding of unlawful sexual conduct, at one time assumptions about rape may have been explained by legal and cultural conditions. In support of this proposition the chapter examines the socio-legal landscape of the mediaeval period during which the common law offence of rape emerged. The history of consent in rape laws is a history of changing attitudes in relation to the locus of consent, its relative importance in ascribing criminality to sexual acts and changes in the philosophical understanding of the concept itself. The way that consent is constructed conditions women's responses to rape and mediates both the circumstances in which an allegation of rape will be brought and the way that such allegations are dealt with in court. The critical determinant of the fluctuating nature of consent in the legal context is the prevailing socio-cultural context at particular points in history. As Frohmann and Mertz observe, 'social and cultural patterns ... shape the implementation, interpretation, and effect of the law'.¹⁴⁰

A consideration of the entire history of the changing nature of consent in rape laws is beyond the scope of this chapter. Instead, the focus is on the laws as they affected women at a specific point in time and in a particular region of the globe. The experiences of male victims of rape are not considered, not because such rapes did not occur, but because at that time the sexual abuse of men and boys did not appear in the legal records. Homosexuality was not a crime known to the law and cases of male rape were prosecuted as sodomy in the ecclesiastical courts. Similarly, sexual offences against children are not covered as the only issue in such cases was whether the sexual act was committed and not the question of the child's consent. The discussion centres on Western Europe since it is there that we find the roots of our own legal tradition. The choice of the mediaeval period, specifically the high and late middle ages, as a starting point is also a pragmatic one. This period, which spans the 11th to 15th centuries, coincides with the earliest English rape statutes as well as the first compendious and organised treatise on the procedural law of England, a work which includes some discussion of the substantive law as well.¹⁴¹

Chapter 2 argues that there is a legitimate viewpoint, somewhere between a broad acceptance of the literal truth of rape myths and an inflexible belief that they are

¹³⁹ See Denise Lievore, Office of the Status of Women, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004).

¹⁴⁰ Lisa Frohmann and Elizabeth Mertz, 'Legal Reform and Social Construction: Violence, Gender and the Law' (1995) *Law and Social Inquiry* 828, 835.

¹⁴¹ George D G Hall (ed), *Tractatus de Legibus et Consuetudinibus Regni Anglie qui Glanvilla Vocatur: The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson, 1965).

the hateful product of an unreconstructed misogynistic and patriarchal society, which admits the truth of elements of both positions. It claims that, whatever the current validity of such beliefs, originally they may not have been entirely inexplicable. First, the chapter considers the basis on which rape was criminalised and the implications that this discrete doctrine of rape held for female complainants and the way that rape cases were prosecuted. It concludes that the theoretical basis for the criminalisation of rape justifies the force and resistance requirements and explains the inherent distrust of rape complainants. Second, it considers whether allegations of rape and reactions to sexual assault were perhaps an inevitable response by women to particular historical controls imposed on them — socially, sexually and economically. It examines the dependent position of mediaeval women, using the practice of arranged marriages as a case in point to illustrate the consequences of their subordinate status. At this particular period in history the social, economic and sexual constraints imposed on women and girls severely curtailed their personal autonomy in many areas of their lives. It is possible therefore, particularly in regard to the choice of marriage partner, that accusations of rape or abduction may have afforded women a degree of self determinism. If a woman claimed to have been defiled, other offers of marriage would not be forthcoming and the field would be left clear for her ‘defiler’. The argument is made that a link can be established between the methods adopted by some women to exert their autonomy and marry a man of their own choosing and the myth that women fabricate allegations of rape.

Third, it examines the way in which attitudes and beliefs about the nature of women may have originally provided a justification for widespread confidence in the accuracy of misogynistic assumptions about rape complainants. The model of womanhood that females were expected to emulate held them to a standard of virtue that only the truly saintly could hope to attain. Social mores dictated a standard of chastity far greater than that expected of men. The Virgin Mary was presented as the exemplar of womanhood and women were counselled to imitate her, to be meek, obedient, compliant and chaste. Conversely, the middle age orthodoxy, rooted in Aristotelian generalisations about the female sex,¹⁴² was that, by nature, women were weak, inconstant, emotional rather than rational and, importantly for this discussion, sexually voracious. Consequently, in her efforts to conform to the sexual constraints of her cultural milieu a woman had to deny the essential nature ascribed to her. This apparent tension between the natural inclinations of the flesh and the model of behaviour imposed by society provided fertile ground for the cultivation of several rape myths. If the indulgence of carnal appetites was socially and legally taboo, forced sex which she was apparently

¹⁴² Mary Anne Cline Horowitz, ‘Aristotle and Woman’ (1976) 9(2) *Journal of the History of Biology* 183.

powerless to resist enabled a woman to satisfy her sexual desires whilst avoiding censure or punishment. Rather than being unwelcome, forceful or even violent sex in fact suited the woman's purpose. The result may be a conclusion that women enjoyed forceful sexual activity. Moreover, the fact that women were compelled to dissemble reluctance towards sex provides a foundation for the belief that when a woman says no to sex she really means yes. Additionally, since it was assumed that women's biology programmed them to be always eager for sex, all outward resistance was inherently suspect.

The chapter then analyses the basis for the belief that real rape is perpetrated by a stranger. It argues that the hierarchic and patriarchal social structure granted men a degree of sexual licence over their dependent women such that incidents of rape and sexual assault in that context were at most met with moral censure. Assaults by strangers, however, were more than just a violation of the victim. They also represented a threat to a man's governance of his household and on that basis were unambiguously proper subjects for criminal sanctions. Finally, the chapter considers the fundamental importance placed on female chastity and the influence that this had on the generation of negative stereotypes about the female victims of sexual assault. Males had many avenues for proving their worth—strength, courage, political or financial success—but women had only their virtue. Therefore, a woman without virtue could not be redeemed by her possession of other personal qualities. The loss of virtue entailed far more severe repercussions for a woman than for a man. When a woman was caught in compromising circumstances, it may have been better for her to claim that she was raped rather than be stigmatised as a fallen woman. If proof of rape avoided the brutal consequences for being discovered in non-marital sexual intimacy, false allegations may not have been uncommon and scepticism of the complainant's account would be quite understandable. This suggests a rationale for the central prejudice which feeds into all of the common myths about rape, that women fabricate accusations of rape.

The danger of these myths is that they provide a spurious rationale for the inherent suspicion with which the complainant's denial of consent is often received and a plausible explanation why her testimony alone is so seldom sufficient to remove from the jury all reasonable doubt as to the defendant's guilt. In conclusion, the chapter suggests that there may be a better prospect for effectively challenging these entrenched attitudes if, instead of outright condemnation, it is acknowledged that, at some point in the past there were justifications for them. Critically, however, those justifications arose in the context of a social and cultural reality that is now at least 800 years distant. Given the fundamental changes that have been wrought in the jurisprudence of rape, attitudes towards female sexuality and women's freedom to participate in all areas of society it is impossible to justify their continued influence in modern times.

2.2 The Basis for Criminalisation

The origins of the mediaeval law on rape are to be found in the Roman offence of ‘*raptus*’. *Raptus* was a private rather than a public offence and it was prosecuted by the male guardian of the female victim in his position as the injured party. It dealt not only with forced sexual intercourse but also with the act of abducting a woman from her home and family.¹⁴³ Contemporary commentary on the mediaeval version of the crime is admittedly vague and ambiguous but there are indications that, at that time, the offence of rape, in the sense of sexual violation, was conflated with the crime of abduction. For example, one of the earliest English works, *The Treatise on the Laws and Customs of the Realm of England* (‘*Glanvill*’), attributed to Ranulf de Glanvill (chief ‘justiciar’ or minister during the reign of Henry II), notes, ‘[i]n the crime of rape [*raptus crimen*] a woman charges a man with violating her by force in the peace of the lord king.’¹⁴⁴ Since the sense of the Latin word *raptus* encompasses both forced coitus and abduction it is unclear which of these wrongs Glanvill is describing. Some commentators have argued that *Glanvill* and a later text, *On the Laws and Customs of England* (‘*Bracton*’),¹⁴⁵ which reproduced much of the earlier work, describe the offence as if it relates to forced coitus alone.¹⁴⁶ They thus conclude that during this period rape referred to ‘illegal forced intercourse.’¹⁴⁷ This conclusion, however, remains a matter of debate.¹⁴⁸

Whether the earliest mediaeval texts are considered ambiguous or not there is little doubt that changes in the law during the late thirteenth century confirmed the double meaning of the Roman source law and the Latin text. The *Statutes of Westminster I* (1275) and *Westminster II* (1285) cloud the issue by respectively dealing with both forms

¹⁴³ James A Brundage, *Law, Sex, and Christian Society in Mediaeval Europe* (University of Chicago Press, 1987) 48.

¹⁴⁴ *Glanvill*, above n 6, XIV, vi, 175.

¹⁴⁵ Henry de Bracton, *On the Laws and Customs of England* (Samuel E Thorne trans, Belknap Press, 1968) vols 1–4.

¹⁴⁶ See the discussion in Christopher Cannon, ‘Raptus in the Champaigne Release and a Newly Discovered Document Concerning the Life of Geoffrey Chaucer’ (1993) 68(1) *Speculum* 74, 79. Bracton writes, ‘If he is convicted ... [this] punishment follows: the loss of members, that there be member for member, for when a virgin is defiled she loses her member, and therefore let her defiler be punished in the parts in which he offended’: Bracton, above n 10, vol 2, 414–15, the implication being that the appeal of *raptus* is reserved solely for the rape of a virgin. See also Corinne Saunders, ‘Middle English Romance and the Law of *Raptus*’ in Noël James Menuge (ed), *Mediaeval Women and the Law* (Boydell Press, 2003) 105, 108.

¹⁴⁷ John Marshall Carter, ‘The Status of Rape in Thirteenth Century England: 1218-1275’ (1984) 7(3) *International Journal of Women’s Studies* 248, 250.

¹⁴⁸ See generally, Nazife Bashar, ‘Rape in England between 1550 and 1700’ in London Feminist History Group (ed), *The Sexual Dynamics of History: Men’s Power, Women’s Resistance* (Pluto Press, 1983) 28; Henry Ansgar Kelly, ‘Statutes of Rapes and Alleged Ravishers of Wives: A Context for the Charges Against Thomas Malory, Knight’ (1997) 28 *Viator* 361; Henry Ansgar Kelly, ‘Meanings and Uses of *Raptus* in Chaucer’s Time’ in *Inquisitions and Other Trial Procedures in the Mediaeval West* (Ashgate, 2001).

of *raptus* collectively in a single chapter in the case of Westminster I, and by failing to make any distinction between the two species of offence in the case of Westminster II.¹⁴⁹ Writing later, Pollock and Maitland state that the two offences were virtually indistinguishable. ‘The crime which we call rape had in very old days been hardly severed from that which we call abduction’.¹⁵⁰ This co-mingling of the two offences, which in modern times are unquestionably seen as separate and distinct crimes, suggested that the theoretical basis for criminalising abduction pertained equally to rape. The gravamen of the offence was thus constituted by the usurpation of a male guardian’s property rights in the victim.¹⁵¹

What is more, rape in the sense of forcible sexual penetration represented only one of a number of penetrative sexual offences. Fornication and adultery were also criminal offences since, at that time, all sexual activity was unlawful unless it had been sanctified by marriage.¹⁵² Under conditions where sex was *prima facie* unlawful a woman alleging that she had been violated was simultaneously admitting to the commission of a crime herself.¹⁵³ This denunciatory attitude to physical intimacy entailed several important consequences. First, the court had to resolve the question of which of the parties was culpable. As Coughlin explains, ‘there was every reason *actually* to put the rape complainant on trial, together with the man she accused, since she was guilty by her own account of the crime of fornication or adultery.’¹⁵⁴ If there was a possibility that both had transgressed it would be unfair and unreasonable if the accused alone was under suspicion. Second, the view that sex is intrinsically wrong makes sense of the traditionally narrow construction of absence of consent and the force and resistance requirements. Coughlin argues that, on this account, these features of the crime ‘are better understood as criteria that excuse the woman for committing an illegal sexual

¹⁴⁹ Cannon, above n 11.

¹⁵⁰ Sir Frederick Pollock and Frederic William Maitland, *The History of English Law* (Legal Classics Library, 1982) vol 2, 490.

¹⁵¹ In her examination of the importance of the victim’s consent in the context of mediaeval rape laws Emma Hawkes observes: ‘charges of rape and ravishment were commonly brought by the aggrieved husband as an act of trespass for damages.’ Emma Hawkes, “‘She was ravished against her will, what so ever she say’: Female Consent in Rape and Ravishment in Late-Mediaeval England’ (1995) 1 *Limina* 47, 50.

¹⁵² Even within marriage some sexual conduct was prohibited. ‘Unnatural’ sex acts, collectively referred to as ‘sodomy’ but including not only anal sexual intercourse but oral sexual intercourse and bestiality as well, were prohibited: William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, c1979) vol 4, ch 15, 215.

¹⁵³ The argument that follows owes much to the original perspective that Coughlin adopts in an article on the subject of gender bias in the context of the prosecution of sexual offences: Anne M Coughlin, ‘Sex and Guilt’ (1998) 84 *Virginia Law Review* 1.

¹⁵⁴ *Ibid* 28 (emphasis in original). This is very like the position in many Muslim countries today. See, for example, press reportage of an Afghan woman who was gaoled for adultery after being raped. She was released after being advised to marry the man who had raped her: ‘Afghan Rape Will Marry Her Attacker’ *The Australian*, 3 December 2011, 13.

infraction, than as ingredients of the man's offense.'¹⁵⁵ For example, duress consisting of threats of death or grievous bodily harm was a defence to criminal offences generally, including fornication and adultery.¹⁵⁶ Less extreme forms of coercion, which by modern legal standards would vitiate consent, could not establish the duress defence and thus, were not inconsistent with consent. If, for example, theft was not excused where it was committed under threat of dismissal from one's job, neither should a fornicator's consent be vitiated if her acquiescence was secured by threat of expulsion from her master's home.

The rationale for the demanding force and resistance requirements was that only proof of irresistible force, evidenced by serious injury and resistance to the utmost, would negate the voluntary nature of the unlawful sexual act and thus exonerate the female victim. Unless she was able to prove that she was utterly overpowered she would be unable to establish that penetration had been achieved without her volition.¹⁵⁷ Third, if non-marital sex is presumptively unlawful, the legally correct position is that only mistakes induced by fraud as to the nature of the act and fraud as to the identity of the person could exculpate the complainant.¹⁵⁸ If the complainant did not understand that she was participating in a sexual act then she would lack the mens rea necessary to constitute the crime of fornication. If she mistakenly believed that she was having sexual intercourse with her husband (perhaps under cover of darkness) then she would lack the mens rea necessary to constitute the offence of adultery. Other varieties of fraud induced mistakes could have no bearing on mens rea nor, of course, on the actus reus of the crime.

An understanding of the theoretical basis on which rape was criminalised helps to explain why complaints of rape were often disbelieved and the subordinate status of mediaeval women compounded the difficulties faced by the victim of rape. An understanding of women's perceived social inferiority provides an expository context for the original justifications for prejudicial assumptions about women in the context of sexual assault.

2.3 Female Subordination

During the middle ages, as now, incidents of sexual assault rarely resulted in the lodging of an official complaint and even amongst the minority of assaults actually reported, few

¹⁵⁵ Coughlin, above n 18, 8–9.

¹⁵⁶ Compulsion remains a limited defence under s 20 of the *Criminal Code* although it is no defence to a charge of rape.

¹⁵⁷ Coughlin, above n 18, 35.

¹⁵⁸ At common law it is still the case that fraud which vitiates consent is restricted to these two categories: *Papadimitropoulos v The Queen* (1957) 98 CLR 249.

resulted in charges being laid. Contemporary statistics show that, although sexual offences continue to suffer high rates of attrition,¹⁵⁹ if a complaint does proceed to court nearly 80 per cent of defendants are likely to be proven guilty, either by verdict or by guilty plea.¹⁶⁰ Historically, a much smaller percentage of allegations of rape that actually made it to a court hearing resulted in the conviction of the accused.¹⁶¹ The apparent scepticism, if not outright disbelief with which allegations of rape were received may be understood as an aspect of the well-documented misogyny of the middle ages.¹⁶² Certainly there is ample evidence in the historical sources that the female sex was both maligned and feared.¹⁶³ The mediaeval paradigm of an hierarchic social order positioned the women of each particular social stratum below the men of that class.¹⁶⁴ In the words of a thirteenth century canonist, ‘man is the image and glory of God and woman ought to be subject to man and, as it were, like his servant, since man is the head of the woman and not the other way around’.¹⁶⁵ However, closer inspection of the historical record reveals, not that women were necessarily despised, but that they were considered subordinate, as befitted their proper place in the hierarchy. They might be considered the property of their male guardians but their vital contribution to family fortunes could not be ignored. In an age where the household was the basic economic unit women were vital contributors to the economic prosperity of the family. They worked in the house and on

¹⁵⁹ For a comprehensive treatment of the problem of attrition in sexual assault cases see Kathleen Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39 *Crime and Justice* 565; Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008).

¹⁶⁰ Australian Bureau of Statistics 2011, *Criminal Courts, Australia, 2009-10*, data cube: Excel spreadsheet, cat no 4513.0, < <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4513.0Main+Features12009-10?OpenDocument>>. These figures reveal, however, that in nearly 20 per cent of cases that reach court the defendant is acquitted. This is a much higher rate than most other offences and approximately on a par with homicide offences.

¹⁶¹ Hanawalt’s study of the legal records of eight English counties reveals that rape indictments made up only 0.2% of total indictments and of these only 10% ended in convictions - generally in cases where the victim was a young virgin. Barbara Hanawalt, *Crime and Conflict in English Communities, 1300-1348* (Harvard University Press, 1979) 59-66. However, as D’Cruze asserts, ‘[t]he proliferation of modern surveys that show high rates of women in survey populations who have experienced rape makes it no longer possible to consider the historical data as in any way reflecting the real incidence of sexual violence.’ Shani D’Cruze, ‘Approaching the History of Rape and Sexual Violence: Notes towards Research’ (1993) 1(3) *Women’s History Review* 377, 388.

¹⁶² See, eg, R Howard Bloch, ‘Mediaeval Misogyny’ (1987) 20 *Representations* 1. Bloch argues that the origins of mediaeval misogyny lie in the doctrine that Eve was created from Adam’s rib. ‘Woman, as secondary, derivative, supervenient, and supplemental, assumes all that is inferior, debased, scandalous, and perverse’: at 10.

¹⁶³ See, eg, R Howard Bloch, *Mediaeval Misogyny and the Invention of Western Romantic Love* (University of Chicago Press, 1991).

¹⁶⁴ James A Brundage, ‘Sexual Equality in Mediaeval Canon Law’ in James A Brundage (ed), *Sex, Law and Marriage in the Middle Ages*, Variorum Collected Studies Series (Ashgate Publishing, 1993) vol 6, 66.

¹⁶⁵ Quoted in Brundage, above n 8, 426.

the family land holdings, they raised children and as young brides they supplemented family wealth by the goods and property they brought as dowry. Pragmatism alone would dictate that a family could not afford to spurn half the able-bodied workforce where labour was in short supply.¹⁶⁶ Thus, in order to equip young girls for their proper role, their socialisation and education (such as it was) was geared to one end, 'to produce women as the useful secondary sex'.¹⁶⁷

Not all scholars agree that women were considered inferior to men. Phillips notes, in arguing that women were valued and respected members of mediaeval society, that most of the fiercely misogynistic writings were directed at an elite, learned male audience and that such extreme sentiments are not generally found in the vernacular texts.¹⁶⁸ Nevertheless, as Blamires points out, whilst pro-feminine writings were not unknown, they appear, almost without exception, as reactive texts, doing battle against an ancient history of woman-hating rather than standing on their own as encomia to women.¹⁶⁹ He concludes that ultimately they did little to unseat the masculine world view.¹⁷⁰ Women were expected to be active contributors to the life of the household but also observe their rightful, dependent position, surrendering both their property and much of their autonomy to husbands and fathers. For the most part the domestic sphere was their domain and their role in public life was limited. They were not normally schooled in Latin, the language of scholarship, the Church and the law and as a consequence they were excluded from formal participation in these areas.¹⁷¹ So, for example, Hanawalt observes that, whilst women frequently pursued claims in court (and must therefore have been familiar with the form of the Latin writs) this was the extent of their participation in the legal system.¹⁷² They do not appear in the ranks of justices nor were they permitted to serve on juries. They were not appointed to public offices and in fact it may have been illegal for them to hold such positions.¹⁷³ John of Ely, for example, faced legal sanctions for delegating his duties as a city official to women as this was contrary to the 'worship'

¹⁶⁶ Kim M Phillips, *Mediaeval Maidens: Young Women and Gender in England 1270–1540*, Manchester Mediaeval Studies (Manchester University Press, 2003) 12–13.

¹⁶⁷ Ibid 61.

¹⁶⁸ Ibid 12.

¹⁶⁹ One of the most famous of these reactive texts is Christine de Pisan's, *Querelle du Roman de la Rose* written in response to Jean de Montreuil's fiercely misogynistic mediaeval poem, *Romance of the Rose*.

¹⁷⁰ Alcuin Blamires, *The Case for Women in Mediaeval Culture* (Oxford University Press, 1997).

¹⁷¹ Phillips, above n 31, 66.

¹⁷² Barbara Hanawalt, *The Wealth of Wives: Women, Law, and Economy in Late Mediaeval London* (Oxford University Press, 2007) 37.

¹⁷³ Helen Jewell, *Women in Mediaeval England* (Manchester University Press, 1996) 104.

or good name of the city.¹⁷⁴ A classic example of female disenfranchisement is found in the practice of arranged marriage.

2.3.1 Arranged and Coerced Marriages

Although the custom of arranged marriage was a feature of mediaeval life it does not seem to have been equally prevalent across all levels of society. Arranged marriages were primarily a means of securing property or political advantage and as a consequence may have been less widespread amongst the lower orders. For example, prosperity for the peasant classes depended upon their ability as a family to work land. The marriage of children was an opportunity to improve the family's economic stocks. The marriage of a son would bring in an extra worker and perhaps additional livestock as dowry. When a daughter married, although her labour might be lost to her husband's family, perhaps explaining why peasant women married comparatively late,¹⁷⁵ if she had married well her heirs would inherit a larger estate. However, the relatively modest holdings of the lower orders meant that there was usually little property to transfer and hence there was less of an economic imperative attached to marriage. As a consequence, young peasant men and women exercised a greater degree of autonomy in their choice of marriage partner than did their social betters.¹⁷⁶ Goldberg argues that in fact only those of the higher orders actually arranged marriages in a formal way¹⁷⁷ and Hanawalt claims similarly that poor families who had no property to bestow or with which to negotiate did not interfere in their children's marriages.¹⁷⁸

For the upper classes, the primary means of enlarging their estates and improving their social standing was the judicious marriage of their children and the choice of spouse was generally dictated by the father or other male guardian. Far from our modern view of marriage as an expression of the romantic ideal of the union of two loving and mutually compatible partners in life, marriages were arranged with a dispassionate calculation of the value of the bride's dowry, what she might contribute in the form of land or titles,

¹⁷⁴ Ibid. See also P J P Goldberg, *Mediaeval England: A Social History 1250–1550* (Hodder Arnold, 2004) 9.

¹⁷⁵ Hanawalt also speculates that, where the family was unable to provide a marriage gift, a girl might work as a servant for some years before she married in order to accumulate her own dowry. See Hanawalt, above n 37, 52.

¹⁷⁶ Frances Gies and Joseph Gies, *Marriage and the Family in the Middle Ages* (Harper & Row, 1987) 242.

¹⁷⁷ Goldberg, above n 39, 25–6.

¹⁷⁸ Barbara Hanawalt, *The Ties That Bind: Peasant Families in Mediaeval England* (Oxford University Press, 1986) 200.

how much dower¹⁷⁹ the prospective bridegroom might settle on her and whether the match would result in a secure transmission of property. Amongst the aristocracy and nobility marriage was also vital as a means of cementing political alliances. The hands of daughters and sons might thus be offered as bargaining chips in political machinations. In such cases, the public declaration of a betrothal sufficed as an indicator that a binding agreement had been concluded, and thus we see very young children promised in marriage by their parents or guardians, with the actual wedding ceremony conducted many years later. Both lay and church authorities permitted the betrothal of children from the age of seven although there are examples of betrothals occurring even earlier.¹⁸⁰ Such politically and economically expedient matches also resulted in great disparities in the ages of husband and wife.¹⁸¹ Choice of husband was not, therefore, an area where personal autonomy could be exercised, after all it was far too important a decision to be left to capricious and irrational women, but a young girl might at least entertain the hope that ties of affection would prompt her parents to select a candidate to whom she was not utterly averse.

Another group likely to have marriages arranged for them were children who became wards as a consequence of the death of their father. Since widowed mothers were not permitted to be the legal guardians of their own children, this group had no cause to hope that parental affection would influence the choice of a congenial marriage partner. Wardship, of which there are many examples in the legal sources, was a potentially lucrative form of property right that granted the guardian rights over the ward's person, property and marriage.¹⁸² The guardian could exploit these rights in his own self-interest by the receipt of revenue generated from the ward's land, by selling the wardship, or by marrying-off the ward and in that way forging beneficial alliances.¹⁸³ The fate of Alice de Rouclif illustrates how vulnerable a young ward was to being exploited for the financial

¹⁷⁹ The dowry was the gift that the bride brought to the marriage and dower was the property she would receive should her husband predecease her. Both could be in the form of real property, money or goods. See Hanawalt, above n 37, 50.

¹⁸⁰ Phillips has shown that the mean age for the commencement of marriage negotiations for royal princesses from the time of Edward I to Henry VII was five and a half. Phillips, above n 31, 39.

¹⁸¹ Chris Given-Wilson and Alice Curteis, *The Royal Bastards of Mediaeval England* (Routledge, 1984) 21. The authors give as an example the marriage of Richard II of England. When Richard and Charles VI of France agreed a truce at Calais in 1396, King Richard, who was 29, married the French princess Isabella who was a girl of only 8.

¹⁸² For a comprehensive treatment of the subject of mediaeval wardship see Noël James Menuge, *Mediaeval English Wardship in Romance and Law* (D S Brewer, 2001). She explains that '[t]he incident of wardship arose when the tenant died, leaving an under-aged heir who, because of his or her minority, could not perform the necessary feudal obligations ... Until this heir came of age ... the lord held custody of his land and body as an extension of his relationship with the heir's father. ... The lord could pass or sell this guardianship on to anyone of his choosing': at 1.

¹⁸³ Phillips, above n 31, 33.

or political advancement of her guardian.¹⁸⁴ Alice's 'spousal'¹⁸⁵ to John Marrays was arranged by her mother when she was only 10 or 11.¹⁸⁶ Prior to the wedding she moved in with her prospective brother and sister-in-law, to learn how to be a good wife and how to manage a household until she was old enough to marry. Soon after, her husband-to-be arrived demanding that the match be consummated. There is evidence, in the records of the court case that these events precipitated, that Alice was raped, but her primary concern was that the union had been consummated before they had been formally married. She had no desire to be Marrays' mistress and was apparently anxious to ratify the future contract to marry that had been made earlier. However, the marriage did not take place. Some months later she was abducted from the house at the behest of her male guardian. Marrays responded by bringing a case for restitution of conjugal rights.

Alice and Marrays, ostensibly the main characters, were really just pawns in a larger drama. Surviving documents relating to the episode hint at a power struggle between the church and the feudal lord that was played out through these two individuals. The spousals were conducted at St Mary's, York, the wealthiest abbey in Northern England and the Abbot was also named John Marrays. He may have in fact been the younger Marrays' father. The feudal lord was Brian Rouclif, Alice's guardian. It seems that he opposed the match arranged by her mother and abducted Alice in order to regain his rights over his ward's marriage.¹⁸⁷ Alice is little more than a mute observer of these events. Others make critical decisions about her welfare and she is powerless to oppose them. It would have been an impossible position for such a young girl with the ultimate resolution of her fate, either to abjure the man chosen for her by her mother¹⁸⁸ or to defy her guardian, determined by outside forces. The only point at which the question of her wishes becomes relevant is where the opposing factions seek the assistance of the courts to determine the validity of the contested marriage, for proof of the consensual

¹⁸⁴ For a comprehensive treatment of this historical drama see Jeremy Goldberg, *Communal Discord, Child Abduction, and Rape in the Later Middle Ages* (Palgrave MacMillan, 2008).

¹⁸⁵ Ibid 25. 'Spousals' were contracts to marry formally at some later date. They could be repudiated by either party, as at canon law there was no marriage without the consent of the two parties, or they could subsequently be affirmed by words of consent or by consummation. In reality there was little possibility that a young girl could repudiate against the wishes of her family.

¹⁸⁶ Alice's mother would not have enjoyed an automatic right to guardianship. The evidence that she arranged the match between Alice and John Marrays suggests that she may have been her daughter's de facto guardian and therefore only responsible for the care of her person and not her property. See Menuge, above n 47, 95.

¹⁸⁷ Goldberg, above n 49, 116.

¹⁸⁸ In fact fines could be levied on wards who refused to marry after being offered suitable marriage partners. Wards had 'the right of refusal not the right of choice'. See Scott L Waugh, *The Lordship of England* (Princeton University Press, 1988) 217–18.

consummation of the marriage would have confirmed that they were now legally man and wife.¹⁸⁹

Under canon law a valid marriage only required the consent of the two contracting parties. If the expressed intention was to marry at some time in the future then a later act of consensual consummation was necessary to establish a present, valid marriage. However, if the couple spoke words of ‘present consent’ then the marriage was valid from that point.¹⁹⁰ Even an exchange of promises made in secret without any witnesses could constitute a valid marriage. The church did eventually regulate the manner in which marriages were to be conducted in its efforts to exert control over a ceremony that had come to be regarded as a holy sacrament rather than purely a civil contract¹⁹¹ but it remained the case that parental consent was not necessary. However, this is not to say that such marriages were at all common. Given the centrality of marriage to family prosperity it was understood that the consent to wed was influenced or even determined by the wider familial and social context. It must have taken great courage, not to mention a reckless disdain for the lands or chattels which the couple would otherwise have acquired, to resist an arranged marriage or enter into a clandestine marriage against family wishes. Margery Paston, a member of the wealthy gentry, fell in love with the family’s bailiff, Richard Calle. Despite considerable pressure from her family, who were implacably opposed to the unsuitable match that promised no improvement to family fortunes, Margery refused to renounce her promise to wed. They were kept apart for two years but eventually the marriage was declared valid by the bishop of Norwich. Margery’s mother, Margaret Paston, ordered the servants to turn her newly married daughter away should she come to visit. Margaret wrote to her son, ‘I charged my servants that she should not be received in my house ... but remember you, and so do I, that we have lost of her but a good-for-nothing, and take it less to heart ... for if he [Calle] were dead at this hour, she should never be at mine heart as she was.’¹⁹²

Unlike Margery Paston, not all women would have been prepared to pay the high price of independent choice. Instead, a woman might allege abduction or sexual violation in the hopes of a more sympathetic response. Since she was blameless she might not be

¹⁸⁹ The eventual outcome is not clear from the historical record but it seems likely that Alice returned to John.

¹⁹⁰ Given-Wilson and Curteis, above n 46, 29; Goldberg, above n 39, 25–6. Since an act of consummation was necessary to ratify a future contract to marry it seems probable that in cases where a young girl was coerced into marriage consummation may have been achieved by force. If the girl could establish that sufficient force had been employed, the marriage might be annulled but ‘this was no easy task’: Sara M Butler, “‘I will never consent to be wedded with you!’: Coerced Marriage in the Courts of Mediaeval England’ (2004) 39(2) *Canadian Journal of History* 247, 251.

¹⁹¹ R B Outhwaite, *Clandestine Marriage in England, 1500–1850* (Hambledon Press, 1995) 4–5.

¹⁹² Conor McCarthy (ed), *Love, Sex and Marriage in the Middle Ages* (Routledge, 2003) 151.

shunned by her family, and, the prospects of attracting another suitor having been destroyed, she would have to marry her abductor or violator. The following section argues that the practice of consensual abductions was not unknown. On the contrary, the fact that legislative intervention was required strongly suggests that it was sufficiently common to present a problem for the ruling classes.

2.3.2 False Allegations of Abduction as a Prelude to Marriage

Two major pieces of legislation introduced after the late 13th century imply that the strategic abduction of women was a genuine concern. The two *Statutes of Westminster*, *Westminster I* and *Westminster II*, were a response to the perception that the manipulation of rape laws by women seeking the freedom to marry a man of their own choosing posed a threat to family interests and prosperity.¹⁹³ The abduction of brides had been prevalent in barbarian times, mainly due, perhaps, to a shortage of women¹⁹⁴ and the practice continued into the early mediaeval period. The structure of the *Westminster Statutes* suggests, though, that the reasons why it was still practised had changed.¹⁹⁵ *Westminster I* extended the definition of *raptus* to encompass not only ravishment of virgins but also of married women. It made the consent of an underage maiden irrelevant since it granted the king the right to sue in cases that were not prosecuted by the victim within forty days. And it downgraded the offence from a felony to a trespass.¹⁹⁶ The legislation continued to conflate rape and abduction, although the underage maiden section, making the question of consent irrelevant to the accused's guilt, could only refer to abduction. An act of sexual intercourse to which both parties consent cannot be rape. Together with the fact that *raptus* could now be committed against any woman, it is clear that the true purpose of *Westminster I* was to address the problem of the abduction of wives and daughters. It is equally clear that it was a failed attempt since, ten years later, *Westminster II* was

¹⁹³ Cannon, above n 11, 81. Sue Sheridan Walker similarly comments that, 'women allowed themselves to be abducted in order to affirm their own choice of a husband and force their families to accept the relationship and they allowed themselves to be abducted in order to leave their husbands.' Sue Sheridan Walker, 'Punishing Convicted Ravishers: Statutory Strictures and Actual Practice in Thirteenth and Fourteenth-century England' (1987) 13 *Journal of Mediaeval History* 237, 237–8.

¹⁹⁴ Gies and Gies, above n 41, 33.

¹⁹⁵ Abduction was not limited to girls and women. Male wards were also at risk of abduction. See, eg, the case of Robert Huberd discussed in Hanawalt, above n 37, 79. However, once a man reached his majority he enjoyed a freedom to choose a marriage partner that was denied to women.

¹⁹⁶ *Statute of Westminster I*, 3 Edward, c.13, 1275: 'And the king forbids anyone to rape, or take by force a damsel under age, either with her consent or without it, or a married woman or a damsel of age or any other woman against her will; and if anyone does so the king will, at the suit of him who will sue within forty days, do common justice therein; and if no one begins his suit within forty days, the king will sue in the matter; and those whom he finds guilty shall have two years' imprisonment and then shall make fine at the will of the king'.

enacted. This statute was drafted in both Latin and French. The French text provides that the ravishment of any woman, whether she consents or not, is a felony. Again, this suggests that the reference is to abduction since *raptus*, in the sense of forced coition, could not be made out where consent existed. However, since the word ravish is used as a synonym for the Latin word *raptus*, its intended meaning is similarly imprecise. The clause does not make it clear whether it is used inclusively to refer to both forcible coition and abduction or whether it should be understood as encompassing only the former.

The Latin clauses in Chapter 34 are less ambiguous and their purpose seems plain. They were intended to protect property interests that were threatened by a woman's consensual liaison that was not sanctioned by the family. The clauses deal respectively with the abduction and elopement of married women, and the abduction of nuns and it is clear that the desire of the drafters was to defeat potential property claims of women who had been abducted.¹⁹⁷ Where a married woman was abducted the statute provided that the king should have suit for the goods taken with her; where a wife willingly left her husband she was barred from claiming her dower; where a nun was abducted the abductor was liable to three years imprisonment, recompense to the religious house and a fine 'at the king's will.'¹⁹⁸ These discrete punishments reflected the relative property value of the different categories of women. Post notes, in his analysis of Chapter 34, that the 'clause ... was invoked sufficiently frequently to show that it met a real want,'¹⁹⁹ and the later enactment of the *Statute of Rapes* in 1382, 100 years after *Westminster II*, is evidence that abduction continued to present a substantial and persistent problem.²⁰⁰

Although the title suggests that the *Statute of Rapes* was concerned with sexual violation it is clear from its contents that, as was the case with *Westminster I*, the real purpose was to address the problem of consensual abductions of wives and daughters. The statute provided that, where a woman consented to her abduction ex post facto, both she and her abductor forfeited their rights of inheritance. Those rights immediately reverted to their next of kin. It also bestowed on the victim's male guardians the right to sue the ravisher 'for life and member'²⁰¹ irrespective of the woman's consent.²⁰² This was

¹⁹⁷ For example, the second provision reads, 'And if a wife willingly leave her husband ... she shall be barred forever of action to demand her dower': *Statute of Westminster II*, 13 Edward 1, c.34, quoted in Kelly, 'Statutes of Rapes', above n 13, 368.

¹⁹⁸ *Statute of Westminster II*, 13 Edward 1, c. 34.

¹⁹⁹ J B Post, 'Ravishment of Women and the Statutes of Westminster' in J H Baker (ed), *Legal Records and the Historian* (London Royal Historical Society, 1978) 150, 157.

²⁰⁰ *Statute of 6 Richard II*, Stat. I, c.6.

²⁰¹ Literally, to sue for punishment of death or loss of a limb.

²⁰² *Statute of 6 Richard II*, Stat. I, c.6.

an important symbolic concession,²⁰³ not granted by either *Westminster I* or *Westminster II*, which recognised the primacy of the guardian's interests over those of the victim. There are tantalising clues that the statute was effective in discouraging such abductions as research reveals that the years after its enactment did not see an increase in the number of private prosecutions brought in respect of abducted daughters. Though the *Statute of Rapes* had given male kin the right of appeal it appears that it was sufficient that the legislation had been enacted to obviate the need for it.²⁰⁴

The genesis for the legislation seems to have been a petition to parliament by Sir Thomas West. His daughter, Eleanor, had been abducted by Nicholas Clifton and a party of his men. Whether she was complicit in this apparent kidnapping is not clear but she later married her abductor. The *Statute of Rapes* was enacted during the ensuing session of parliament and, although it did not explicitly refer to the West petition itself, it was plainly intended to resolve the patrimonial complications created by the consensual abduction of heiresses as well as the flight of adulterous wives.²⁰⁵ The repeated attempts to craft legislative solutions to the problem strongly suggest that staging the abduction of a prospective bride was effective and that this enabled some women to conclude a match of which their family disapproved.

2.3.3 Prosecution of Appeals of Rape

It is evident, then, that there was no clear distinction between the crimes of rape and abduction. It also seems likely that a practice existed of abducting women in order to secure a marriage and that women may sometimes have been complicit in the abduction. Given the ambiguity in the text of the various pieces of legislation, it is possible that at least some of the cases of *raptus* that came before the courts were actually claims of forced coition rather than abduction. If that is the case, it may be that, just as they lied about abduction, women also falsely alleged rape either to overcome family opposition or perhaps to force a young man to wed. The next section considers first, whether this is a credible hypothesis and second, whether there is any evidence that it happened.

If the intention in alleging rape was ultimately to contract marriage, the brutal, and sometimes fatal, consequences prescribed for convicted rapists might suggest that it was an unlikely strategy. In Glanvill's time rape was punishable by death or

²⁰³ Post states that the nearest courts ever came to imposing this drastic punishment was a single instance in 1305 where payment of a fine was considered as satisfaction of the debt: Post, above n 64.

²⁰⁴ Emma Hawkes, 'Preliminary Notes on Consent in the 1382 Rape and Ravishment Laws of Richard II' (2007) 11 *Legal History* 117, 132.

²⁰⁵ See the extensive treatment of this episode in J B Post, 'Sir Thomas West and the Statute of Rapes, 1382' (1980) 53(127) *Historical Research* 24.

dismemberment which might include blinding or castration or both. The punishment was briefly downgraded to two years imprisonment and fine after the passage of *Westminster I* (1275) before *Westminster II* (1285) reinstated it as a capital offence. An allegation of rape also exposed the complainant to the risk of being tried as a fornicator herself and the possibility of suffering the not insubstantial penalties for falsely alleging rape.²⁰⁶ The period allowed for two methods of prosecuting rape. The first was by a private prosecution, referred to as an appeal. This required, initially, a prompt complaint made to local authorities by the victim, together with evidence that a crime had been committed. This complaint was later formally put before the itinerant justices of the eyre courts. These courts exercised royal justice throughout the counties of England. The second method of prosecution was presentment. When the eyre justices held court in a particular locality a jury of twelve men was tasked with reporting to them any appeals that had arisen since the last eyre. The jury was also required to present crimes which had not been appealed by the victim, hence the use of the term ‘presentment’.

Legal records suggest that rape may have been a presentable crime²⁰⁷ but Groot has found only a single instance where an alleged rape that had not been appealed by the victim was presented before an eyre court.²⁰⁸ His explanation is that rape was viewed either by the courts or the populace as a wrong that did not demand the public intervention of a jury but was more amenable to privately negotiated reparation or compensation.²⁰⁹ He gives examples both of appeals resolved by marriage and by the payment of monetary compensation²¹⁰ and notes that *Glanvill* describes the practice of ‘prejudgment concords [settlements] by marriage.’²¹¹ An unchaste woman’s hopes of an advantageous match with another man were severely compromised, so marriage to the accused may have been regarded as an acceptable or even appropriate method of concording, or settling, an appeal of rape.²¹² If the injured party sought financial compensation rather than marriage an appeal of rape was still the only means at their disposal since, until the mid-13th century, there was no legal avenue for suing for

²⁰⁶ The punishment for a false appeal or the abandonment of an appeal was either a fine or imprisonment. Kittel notes: ‘Only in cases of extreme poverty or youth would the penalty be remitted’. Ruth Kittel, ‘Rape in Thirteenth-Century England: A Study of the Common-Law Courts’ in D Kelly Weisberg (ed), *Women & the Law - a Social Historical Perspective* (Schenkman Publishing, 1982) 107.

²⁰⁷ Not all crimes required presentment. It is clear that the crimes of murder, arson and robbery (amongst others) were presentable but the evidence in relation to rape is inconclusive. See Roger D Groot, ‘The Crime of Rape temp. Richard I and John’ (1988) 9(3) *Journal of Legal History* 324, 325–6.

²⁰⁸ Ibid 326.

²⁰⁹ Ibid.

²¹⁰ Ibid 327. Hanawalt, too, gives examples of cases where parents sought compensation for the loss of a daughter’s virginity. Hanawalt, above n 37, 46–8.

²¹¹ Groot, above n 72, 333 n 34.

²¹² Butler, above n 55, 253–4.

damages.²¹³ Although resorting to a serious criminal allegation may seem an extreme step to take, in fact the harsh penalties prescribed for the offence were almost never imposed.²¹⁴ In her examination of 20 eyre records from different parts of England for the period 1202–1276, Kittel unearths only 142 cases of rape and amongst these not a single instance where a sentence of castration or mutilation was imposed.²¹⁵ Carter has analysed eyre rolls for the period 1208–1321 and, from a total of 145 cases, discovered only 10 punishments that he terms ‘corporal’, eight sentences of outlawry and two of hanging, although all these are classed as ‘indirectly-related punishments’ suggesting that they were imposed in respect of collateral crimes committed upon the victim rather than for the rape itself.²¹⁶ If there was family opposition to a match that a woman desired, or if the young man needed to be convinced, a false allegation may have offered a solution that in effect carried little risk.

Although it is possible that allegations of rape may have been used in this way, for a number of reasons evidence for the practice is much less compelling than the evidence in relation to consensual abductions. The fact of abduction was patent in the woman’s absence from her home but victims of rape in the sense of forced coition were required to follow a strict procedure just to have the allegation heard in court. This procedure is described in *Glanvill*:

A woman who suffers in this way must go, soon after the deed is done, to the nearest vill and there show to trustworthy men the injury done to her, and any effusion of blood there may be and any tearing of her clothes. She should do the same to the reeve of the hundred. Afterwards she should proclaim it publicly in the next county court.²¹⁷

Courts were scrupulous about requiring strict adherence to form, a practice that intensified after the passage of *Westminster I*,²¹⁸ and there are examples of appeals being disallowed for the most trivial of reasons.²¹⁹ Only those appeals that met the almost impossibly exacting standards are likely to appear in the historical record. Since the prospects of conviction were so grim, it seems unlikely, in any case, that a threatened rape claim would have offered much inducement to marry. However, there are examples of families pressuring an alleged ravisher into a marriage with their daughter and Post suggests that in some cases the bringing of an appeal may have been a pretext to this

²¹³ Groot, above n 72, 332 n 33.

²¹⁴ See, eg, J M Kaye, ‘The Making of English Criminal Law’ (1977) *Criminal Law Review* 4; Kittel, above n 71, 101; Carter, above n 12, 248–59; Post, above n 64, 150–64; J M Carter, ‘Rape and Mediaeval English Society: The Evidence of Yorkshire, Wiltshire and London, 1218–76’ (1982) 13 *Comitatus: A Journal of Mediaeval & Renaissance Studies* 33, 62–3.

²¹⁵ Kittel, above n 71, 110.

²¹⁶ Carter, above n 12, 255, 257 n 20.

²¹⁷ *Glanvill*, above n 6, 175–6.

²¹⁸ Post, above n 64, 155.

²¹⁹ *Ibid* 155–6.

end.²²⁰ Other commentators, too, acknowledge the real concern that existed that false allegations might be used to force a man into marriage.²²¹ However, belief in the existence of a systematic practice of false allegations perhaps says more about men's fear that women might connive to trap a man into an uneconomic marriage than about women's propensity to lie about rape.²²²

It is conceivable that couples might have exploited the public shame of a daughter's defloration to force the family to accept the man who had deflowered her as her spouse. Post claims that the settlement of appeals in this way, prior to judgment, was a common practice. He states that 'the public declaration of a sexual relationship may sometimes have been adopted as a means of coercing parents and families into consent to a match of which they had previously disapproved'.²²³ Such a declaration may have been effective where both were intent on marriage, given the unlikely prospect of punishment for the man and the risk that the family's social standing would be damaged should they persist in their opposition to the union. Whether similar tactics were employed to drag a reluctant groom to the altar is a different question altogether. Where what was alleged was rape rather than fornication a woman had everything to lose. She risked her good name and courted criminal charges herself in the vain hope that the insubstantial threat of punishment would secure the man's assent to wed. Kittel's analysis of a representative sample of 13th century court records indicates that appeals of rape were rarely concluded by marriage and that the most common outcome was that the woman discontinued her suit without securing any form of compensation. Both Post and Kittel agree that there are some examples of such appeals being concurred by marriage,²²⁴ however the evidence suggests that such an outcome was likely to be uncommon.²²⁵

The evidence that false allegations of rape were used as a pretext for marriage seems much less convincing than the evidence that thwarted lovers employed false allegations of abduction to this end. It is still possible however that, owing to the conflation of rape and abduction in the crime of *raptus*, the evidence relating to abduction was also received as evidence that women falsely alleged rape or forced coition in the same way. Accordingly, it may be a reasonable hypothesis that the widely-held belief that women lie about rape originated in the fact that female subjection forced women to resort

²²⁰ Ibid 153.

²²¹ Kittel, above n 71, 106–7; Post, above n 64, 152. See also Hanawalt, above n 37, 74. Hanawalt relates a case where a family enlisted a local constable to catch a young couple in the act and hence force them into marriage.

²²² The danger that an allegation of rape might be a means to force a man into marriage is noted in *Glanvill*, above n 6, 6.

²²³ Post, above n 70, 24.

²²⁴ Kittel, above n 71, 106–7; Post, above n 64, 152.

²²⁵ Kittel, above n 71, 107.

to subterfuge if they wished to marry the man of their choice. But it is not only female disenfranchisement that suggests an explanation for the emergence of prejudicial rape stereotypes. Prevailing attitudes in relation to the way in which women's biological make-up pre-determined their sexual behaviour may also have created fertile ground for the development of these myths.

2.4 The Nature of Women

Mediaeval attitudes towards women owed much to classical ideas about the essential differences between men and women. According to ancient Greco-Roman tradition woman was created as an imperfect version of man and, whereas he embodied rational thought and action, she was the slave of her carnal appetites. Man's physical make-up was hot and dry which gave him greater strength and endurance. Conversely, women were cold and moist and, though this rendered them physically weaker, it also meant that they were a potential source of contagion for man. Both men and women accumulated excess bodily 'humours' but women were unable to purge these in the ways that men could, by their natural heat, by physical exertion or by the growth of beards and body hair.²²⁶ Instead excess humours were expunged during menstruation. Menstrual blood was regarded as toxic of itself but it was also a clear signifier of women's generally contaminous nature. Women were also unstable and changeable by nature: 'A woman's *complexio* is more humid than a man's ... Whatever is humid is easily changed, and so women are inconstant and always seeking new things ... there is no faith in woman'.²²⁷

For the Romans, semen was the source of men's strength.²²⁸ The greater heat of their bodies generated powerful sexual urges but the satisfaction of these urges through ejaculation also meant that the sexual act depleted their masculinity. Women, however, were fortified by frequent sex. They were almost constantly sexually receptive, seeking the heat of a male to dry up and disperse their moist humours. They also matured earlier and thus were capable of intercourse at an earlier age than males. According to canon law, girls reached puberty at 12 and boys at 14.²²⁹ Since too much sex was debilitating for men, sexually voracious women were a threat that must be guarded against. The perceived asymmetry in sexual desire between men and women created more than simply

²²⁶ See Joan Cadden, *Meanings of Sex Difference in the Middle Ages: Medicine, Science and Culture* (Cambridge University Press, 1993) 181–3. See also Phillips, above n 31, 24.

²²⁷ Alberti Magni, *Opera Omnia*, vol xii, *Quaestiones super de Animalibus*, ed. Ephrem Filthaut OP, (Aschendorff: Monasterii Westfalorum, 1955), xv, qu.11, quoted in J D Burnley, 'Criseyde's Heart and the Weakness of Women: An Essay in Lexical Interpretation' (1982) 54 *Studia Neophilologica* 25, 35.

²²⁸ See Vern L Bullough and James A Brundage (eds), *Handbook of Mediaeval Sexuality* (Garland Publishing, 1996) 82–3.

²²⁹ See Gies and Gies, above n 41, 139. See also Goldberg, above n 39, 26.

an interesting medico-philosophical debate however. Rather, it entailed a suite of practical consequences that directly impinged on what was considered the acceptable public face of a woman, particularly once these ideas were embraced by the all-powerful mediaeval Christian church.

2.4.1 The Ideal Complainant

The classical understanding is also found in the Judaeo-Christian view of women that the middle ages inherited. On a conventional reading of the Book of Genesis Eve was inferior to Adam because she was formed from his rib. Women were the subordinate sex, not just because of their essential nature but also because it was ordained by the divine order. However, the Christian Church embraced a bifurcated perspective on women. Although they were the weaker sex they were also a source of danger for men. Women would lead men into sin just as Eve tempted Adam to eat from the tree of knowledge. By this act Eve unleashed all suffering on the world and brought upon all her gender the punishment of the agony of childbirth.²³⁰

The fundamental hope that Christianity holds out is the prospect of redemption from sin so it was possible for women to overcome their allegedly sinful nature. The lives of saints were used to advocate a particular model of virtuous femininity. In the Christian tradition Mary was the exemplar of womanhood. She was the ideal for all women but she possessed qualities that were of particular importance to young women, notably chastity, humility and obedience.²³¹ Her virtues were expounded in sermons and devotional texts and in plays depicting her life. Veneration of the Virgin was widespread, promoted and accessible even to illiterate girls. Exemplary women were also found in both Bible Testaments, in stories from the classical tradition and in the accounts of virgin martyrs.²³² From these accounts young women were taught to be obedient to their parents in all things save only where defiance was necessary in the defence of faith or virginity. The

²³⁰ Blamires argues that this interpretation was not universally accepted. He points to the growth during the middle ages of an alternative understanding of the biblical story of creation and Christian redemption, one that championed women's superiority over men. The notion of the 'privileges of women' arose from a set of six or seven biblical episodes that, when interpreted in a particular way, revealed women's superiority. Woman was created from Adam's bone, a substance superior to the mud from which he was created; she was created within Paradise whereas Adam's entry into the Garden of Eden came after his creation; she was created after Adam as the crowning glory of God's creation; a woman is the mother of Christ; it was a woman (Mary Magdalene) to whom Jesus first revealed himself after the resurrection; and the Virgin Mary sits at God's right hand, above even the angels. Blamires, above n 35, 96–7.

²³¹ Phillips, above n 31, 78.

²³² Blamires, above n 35, 171–98. For a comprehensive treatment of the phenomenon of the legends of virgin martyrs see Karen A Winstead, *Virgin Martyrs: Legends of Sainthood in Late Mediaeval England* (Cornell University Press, 1997). These legends dramatised the staple teachings of the Christian Church in a way that proved enduringly popular with mediaeval audiences.

apparent popularity of such edifying texts implies that there was seen to be a real need to impose strict controls over women's behaviour. Indeed one of the most common themes to be found in the instructive literature is that women needed to be ever vigilant, not only against the theft of their virginity, but also against their own innate carnal desires that would, if unchecked, lead them into wickedness.

Although all women were enjoined to remain chaste, the way in which this was best accomplished depended upon one's social status. The high born were possessed of a native capacity for self-control and therefore their own strength of will would enable them to resist the temptations of the flesh. Lower status women had no such self-restraint and their salvation lay in avoiding situations where they might be unable to resist the attractions of carnal pursuits. They were advised to remove themselves from temptation, not to go about alone, not to greet men in the street, not to sit alone with men.²³³ Thus dancing and singing were eschewed because they offered opportunities for men to ravage them and because such activities conditioned women to be lecherous. All women though, whether the daughters of noblemen or girls who had left home to go into service, were enjoined to be meek and obedient, not to go out unchaperoned, to be circumspect in speech and to dress modestly.²³⁴

Dress was important as a signifier in a number of ways. The care that a woman took in her appearance and the quality of her clothes marked her as belonging to a particular social class but it was also symbolic of her absorption in superficial concerns and her sexual receptivity. Since the female sex drive was more enduring than the male's there would inevitably be occasions when a woman's desire for intimacy was not matched by her partner's. However, men were vulnerable to women's charms and any initial lack of sexual interest might be easily overcome by immodest dress and coquettish behaviour. Once aroused, the male sexual impulse was irresistible so women had to exercise caution in wielding this power over men. In a view with a clear modern parallel, provocatively clad women were a sexual temptation that men could not resist. Armed with this knowledge, if women chose to dress that way then they conspired in their own sexual violation.²³⁵ Females were the captains of male desire so that if a woman chose to wear an overly decorative or immodest costume she was implicitly communicating her consent to engage in sex. The accepted understanding of gendered sexuality thus denounced women as manipulative temptresses but exculpated men as helpless victims of their uncontrollable passions.

²³³ Phillips, above n 31, 94–5.

²³⁴ Ibid 92.

²³⁵ Ibid 81–2.

2.4.2 Biology in Conflict with Societal Expectations

These rules of conduct were in direct opposition to women's natural instincts as broadly understood. A woman's incessant biological drive for sex, and societal demands that she be modest and reserved in her relations with men, could not exist in harmony. And, perhaps, herein lies the explanation for the enduring belief that women enjoy being forced into having sex. Overt expression of a desire for sex risked, at the very least, public censure. Respectable women were expected to evince a reluctance to engage in sexual activity and at least offer outward resistance to sexual advances. Indeed, the formula of persuasion, met by resistance and eventual capitulation was (and arguably still is) the very hallmark of normal seductive technique according to which even strong protestations were understood as 'no more than a concession to modesty or a deliberate incitement ... to persuade a little harder'²³⁶ and 'no' could justifiably be interpreted as 'yes'. By feigning reluctance and ultimately only capitulating when beset by overwhelming force a woman could at once protect her reputation and satisfy her biological drives. The use of force enabled her to enjoy sex without pangs of conscience or the risk of public shame. Men were not so constrained in the expression of their sexual desires. It was man's nature to be subject to irresistible sexual impulses and as a consequence his natural role was to instigate sexual relations.

Historical conceptions of gendered sexuality which construct the sexually aggressive male and the dissembling, submissive female make sense of a belief that a woman's consent can be inferred from her conduct and manner of dress and a conviction that, in attempting to obey both the urgings of their own nature and the external dictates of society they have come to enjoy being forced into sexual relations. There is a final aspect of mediaeval attitudes towards women that may help to explain the genesis of rape myths. In a sense it can be seen as the inevitable result of coupling the subordination of women and the limited role they were permitted in public affairs, with the understanding that they were sexually voracious by nature. Women could not seek public honours outside the domestic sphere. A woman's worth thus depended almost solely on how well she measured up to the model of domestic virtue; as a wife she must be faithful to her husband; as a daughter she must remain pure. Esteem in the eyes of others was measured in terms of chastity, and an important aspect of that was a woman's ability, as a member of the weaker sex, to deny her essentially carnal nature. In the following section the

²³⁶ B Fisse, *Howard's Criminal Law* (Law Book, 5th ed, 1990) 178. The use of this modern quote from one of the leading textbooks on Australian criminal law is quite deliberate. It is grim evidence of the continued currency of a coercive model of sexual relations between men and women.

argument is made that equating chastity with moral and social worth created a climate where false allegations of rape might thrive.

2.5 The Pre-Eminence of Chastity

One reason for the existence of a sexual double standard is that a woman's worth was judged according to how closely she emulated the virtuous ideal. Chastity was her only virtue and with the loss of chastity went the loss of respectability.²³⁷ We see evidence of this in the historical legal record where, as Goldberg shows, defamatory statements aimed at women were almost invariably couched in sexual terms.²³⁸ For example, in a disputed marriage case from 1432 allegations of adultery were levelled against a witness to the exchange of vows in an attempt to discredit her testimony.²³⁹ Virtue in a man, however, took many forms, including the cachet that came from sexual conquest.²⁴⁰ A man might prove his worth by displaying, for example, the chivalric virtues of courage, bravery and gallantry towards women,²⁴¹ by commanding authority in public life, or by exercising physical or political power, spheres of activity from which women were generally absent.

The effect of sexual notoriety on a man's reputation could be either positive or negative but there was no such argument about promiscuous women. A reputation for sexual libidinousness was invariably negative. Consequently, sexual indiscretion was much more of a disgrace for a woman. Marriage, sexuality and sexual misbehaviour were regarded as proper subjects for public intervention. The primacy of the family unit meant that society as a whole had an interest in safeguarding the only sanctioned form of sexual relationship, marriage between a man and a woman. This perhaps explains why so many prosecutions for adultery and other sexual transgressions relied upon information provided by local people.²⁴² Once a woman had forfeited her good name, whether there was any substance to the allegations or no, she became a social outcast and her worth as a marriage prospect was devalued. Apart from the strength of her family's social position and wealth, the most desirable attribute for a potential bride was that she be a virgin. It

²³⁷ Blamires, above n 35, 137–8. For a discussion of the importance of sexual reputation for both men and women in mediaeval society see Shannon McSheffrey, *Marriage, Sex, and Civic Culture in Late Mediaeval London* (University of Pennsylvania Press, 2006) 164.

²³⁸ P J P Goldberg (ed), *Women in England c. 1275–1525* (Manchester University Press, 1995) 38. See also L R Poos, 'Sex, Lies, and the Church Courts of Pre-Reformation England' (1995) 25(4) *Journal of Interdisciplinary History* 585. Poos notes that men were more likely to be accused of dishonesty or secular crimes: at 586.

²³⁹ Goldberg, above n 103, 116.

²⁴⁰ McSheffrey, above n 102, 164.

²⁴¹ McSheffrey and Pope observe: 'Chivalric culture had become a crucial defining feature of gentility in England in the fifteenth century.' Shannon McSheffrey and Julia Pope, 'Ravishment, Legal Narratives, and Chivalric Culture in Fifteenth Century England' (2009) 48(4) *Journal of British Studies* 818, 830.

²⁴² McSheffrey, above n 102, 174.

must be acknowledged, however, that this may not have necessarily been the case in relation to peasant sexual morality. Virginity was not so highly prized, pre-marital sexual relations were more commonplace and indeed a man might wish to ensure his prospective bride was fertile before the marriage took place.²⁴³ However, if marriage did not eventuate, a deflowered maiden's marriage prospects were greatly circumscribed. The theft of virginity was a serious wrong and was considered amenable to compensation. A large proportion of appeals of rape were resolved prior to judgment, if not by the marriage of the two parties then by the payment of monetary compensation.²⁴⁴ For the upper classes extra-marital sex and the possibility of children born out of wedlock entailed additional risks for the system of inheritance of property and titles but many low-status victims' appeals of rape are more likely to have been motivated by a desire for compensation for loss of virginity rather than by a concern to protect the patrimony.²⁴⁵

The mediaeval aversion to extra-marital sex was to a large degree a product of the moral leviathan, the Christian Church. The church had an ambivalent attitude to sex, even in relation to licit marital sex. On the one hand the church viewed sexual relations as a moral evil but on the other it had to accept grudgingly that sex was necessary for procreation, one of the fundamental purposes of marriage. Chastity was nevertheless the highest state to which one could aspire. Virginity in young women was prized as an aspect of the Cult of the Virgin Mary but there were also more prosaic reasons for discouraging pre-marital sex. As has been noted, during the middle ages the primary functions of marriage were to establish desirable social networks and familial alliances and to beget children who would be the heirs to the wealth that those alliances created. The choice of marriage partner was critical in efforts to increase family land holdings and social status and a virgin bride ensured certain and unimpeachable succession. The right of primogeniture, whereby the firstborn son inherited the totality of the estate, was introduced to England with the Norman Conquest and became increasingly accepted through the course of the middle ages. Whatever other moral or societal imperatives there may have been for a woman to remain chaste until marriage and monogamous thereafter it was clear that, since sexual fidelity guaranteed the provenance of the children of the union, it was essential in ensuring that property passed to the rightful, legitimate heirs.²⁴⁶

²⁴³ Gies and Gies, above n 41, 242. Presumably loss of virginity would also not present an impediment to the remarriage of rich widows.

²⁴⁴ Post, above n 64, 152–3.

²⁴⁵ See Kittel, above n 71, 108; Groot, above n 72, 328–9; Hanawalt, above n 37, 46.

²⁴⁶ Nevertheless, it must be acknowledged that illegitimacy seems to have been widespread. Given-Wilson cites research which reveals that in the parish of Halesown, for every two women married, one gave birth out of wedlock: Given-Wilson and Curteis, above n 46, 49–50. Given the decimating effects of years of famine followed by the carnage of the Black Death during the years 1348 and 1349, in many cases all legal heirs may have died. As a consequence the strict

2.5.1 Adultery

Due to the crucial importance of the family as an economic unit and the central role that inheritance played in family prosperity, adultery attracted greater opprobrium than simple fornication since it represented a threat to the system of orderly and certain transfer of property. Offences against sexual morality primarily fell within ecclesiastical jurisdiction but the records indicate that the secular courts also heard cases of adultery.²⁴⁷ Although transgressors of both sexes were condemned alike by the church, in practice an adulterous woman attracted greater censure. By her adultery a wife might dupe her husband into raising a stranger's child and that child might hence deprive the legitimate offspring of their rightful inheritance. Men were only rarely punished for the offence.²⁴⁸ Occasionally a man might be ordered to return to his wife and pay some form of compensation but in contrast the range of punishments for a woman were public, humiliating and likely to have severe and long-term impacts. As an example, in a case recorded on the occasion of an episcopal visitation of Canterbury Diocese (1292–1294) a knight found in adultery was ordered to pay a sum of money to the poor as punishment whereas his partner was ordered to be whipped through the marketplace and the church. The judgment concluded that 'it is not seemly for a knight to do public penance'.²⁴⁹ McCarthy provides numerous other examples where the punishment of a public whipping or other humiliation is reserved for the woman alone.²⁵⁰ According to the laws of King Canute (c.995–1035) the punishment for an adulterous woman was the permanent disfigurement of having her nose and ears cut off.²⁵¹ Four hundred years later references to this practice persisted. In a letter to her son dated July 1444 Margaret Paston relates

feudal laws relating to the inheritance of property were somewhat relaxed during the later middle ages. Though bastards could not inherit as of right, inheritance of property, goods and hereditary offices was not completely barred. If there was no legitimate heir and if a bastard was acknowledged by his father as son and heir then it was possible to inherit. However, at least for the upper classes, much depended on whether a petition to the king to allow such a deposition was granted. In the absence of an heir the lands reverted to the Crown and the king might have other plans for them: at 48–9. In a similar vein Hanawalt presents evidence that the stigma of pre-marital sex and illegitimate birth was not so great for peasant stock, perhaps because children were vital to the peasant economy: Hanawalt, above n 43, 195–6.

²⁴⁷ Keith Thomas, 'The Puritans and Adultery: The Act of 1650 Reconsidered' in Donald Pennington and Keith Thomas (eds), *Puritans and Revolutionaries: Essays in Seventeenth-Century History Presented to Christopher Hill* (Clarendon Press, 1978) 257, 265–7. See also Marjorie Keniston McIntosh, *Controlling Misbehavior in England, 1370–1600* (Cambridge University Press, 1998) 69–70.

²⁴⁸ Bullough and Brundage, above n 93, 42. McSheffrey observes that the prosecution of adultery was less gendered in urban London. She suggests that a stricter moral climate prevailed and that sexual transgressors, both male and female, were pursued more assiduously at various times. Records of the local church and civic courts, however, reveal a preponderance of female prosecutions: McSheffrey, above n 102, 183.

²⁴⁹ McCarthy, above n 57, 88.

²⁵⁰ Ibid 89–91.

²⁵¹ Ibid 103–4.

that the husband of a suspected adulteress had threatened to cut her nose off if she came into his presence.²⁵² Under Norman law a convicted adulteress forfeited her dower rights but an unfaithful husband would continue to enjoy rights over his wife's lands should she predecease him.²⁵³ Should a wife commit adultery it was sufficient grounds for separation and divorce and she could be turned out of her home and forbidden from seeing her children but a woman could not as a matter of course divorce her adulterous husband. Instead it must be proven that he had treated her with 'excessive cruelty'.²⁵⁴ The consequences for a woman where an adulterous relationship had come to light could be extreme. She could be cast out on the street with no means of support and the public nature of her disgrace would preclude her from resuming a respectable position in society. The relative harshness with which adulteresses were treated is another example of the primary importance of female chastity, not accorded to sexual virtue in men.

2.5.2 Constraints on Sexual Behaviour

As noted above, the mediaeval view of female sexuality was that females were by nature always sexually receptive. Baines in fact argues an even more extreme viewpoint. She contends that it was believed that women were not merely always receptive but indeed they were pathologically unable to withhold consent and therefore only evidence of extreme violence could establish the absence of consent. In her exploration of rape in early modern legal and literary texts she explains the logic behind this belief: a woman's purpose is procreation, 'the fulfillment of which is assured by her carnal pleasure ... [Hence] woman, *by nature*, cannot wholly resist any form of coitus'.²⁵⁵ Instead, women as the weaker sex required external superintendence to preserve their honour.

The loss of chastity brought dishonour to the woman but it also reflected unfavourably upon the male guardian, whether father or husband and, as McSheffrey states, 'a man's reputation for honesty, good fame, and status depended on his ability to protect and control his dependents'.²⁵⁶ It was on this basis that rules of conduct that applied in a discriminatory way to women's disadvantage could be justified. This is not

²⁵² Norman Davis (ed), *Paston Letters and Papers of the Fifteenth Century* (Clarendon Press, 1971) vol 1, 220.

²⁵³ 'The right of curtesy gave to widowers a life interest in all of the lands that their wife died seised of ... provided the union produced a child.' Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge University Press, 1999) 23. For a detailed analysis of the legal doctrine of curtesy see George L Haskins, 'Curtesy at Common Law: Historical Development' (1949) 29 *Boston University Law Review* 228.

²⁵⁴ Goldberg, above n 103, 18.

²⁵⁵ Barbara J Baines, 'Effacing Rape in Early Modern Representation' (1998) 65(1) *English Literary History* 69, 91 (emphasis in original).

²⁵⁶ Shannon McSheffrey, 'Jurors, Respectable Masculinity, and Christian Morality: A Comment on Marjorie McIntosh's Controlling Misbehavior' (1998) 37(3) *Journal of British Studies* 269, 271-2.

to say that it was only young women who were subject to external constraints on their sexual activities. Apprentice contracts from the central period of the middle ages reveal that male apprentices were also forbidden to engage in fornication. However, a comparison between a surviving prototype contract and a set of indentures drawn up for a particular apprentice reveals that, whilst the prototype stipulates a ban on fornication both within the master's house and beyond its walls for both young women and young men, close inspection of the personalised indentures shows that in practice for boys the prohibition only operated within the house.²⁵⁷ Young indentured males, then, were apparently permitted greater freedom in their sexual conduct than their female counterparts, a conclusion that is supported by the case of an apprentice, John Waryngton, who was forced to marry the female servant he had seduced. On reading the depositions made before the church court in the case the inference is inescapable that his culpability resided, not so much in the fact of fornication per se but in the fact that it was committed under the master's roof. The point is repeatedly made that the seduction occurred inside the master's home. The case also suggests that the sexual conduct was an affront to the master's authority that could not be permitted to pass unpunished.²⁵⁸

Women endured far greater controls over their sexual behaviour but if they succeeded in casting off these restraints they also courted unique legal sanctions that did not apply to men. Fines were levied on villein women for fornication (leyrwite) and for the birth of an illegitimate child (childwite) and although the records do not indicate any consistency in their imposition there is sufficient evidence to suggest that poorer women, who could least afford such an impost, were targeted more often than their more prosperous cousins.²⁵⁹ Courts might order couples to cease sexual relations and, if they failed to do so, the ecclesiastical authorities could sue to enforce marriage.²⁶⁰ Again, such suits seem most frequently to have been brought against members of the lower orders.²⁶¹

Unsanctioned sexual activity exposed women far more than men to potentially ruinous social, legal, financial and familial consequences. Reprehensible as a false allegation of rape is, for a woman discovered in unlawful, consensual sexual activity, as a desperate act of self preservation it may have seemed the only choice.

²⁵⁷ Phillips, above n 31, 83.

²⁵⁸ Goldberg, above n 39, 10. See also Goldberg, above n 103, 110–14 where the source document for this case is reproduced.

²⁵⁹ Phillips, above n 31, 150.

²⁶⁰ 'When couples were presented within the Church courts for cohabiting outside of matrimony, the courts sometimes required them to make an undertaking (abjuration *sub pena nubendi*) that if they continued to have a sexual relationship, it was their intention to be married to one another. In this way further sin was avoided since the couple either abandoned their illicit sexual relationship or entered into matrimony, which legitimized that relationship.' P J P Goldberg, 'Debate: Fiction in the Archives: The York Cause Papers as a Source for Later Mediaeval Social History' (1997) 12 *Continuity and Change* 425, 443–4 n 48.

²⁶¹ Phillips, above n 31, 150.

2.6 Stranger Rape

The stranger rape stereotype is a commonplace of the research literature and indeed it forms one of the axes of the real rape scenario. The spectre of the rapist psychopath reassures normal men that aggressive coercion on their part is not rape and it also encourages victim blaming in those cases where the accused is known to the complainant.²⁶² Despite clear empirical evidence that exposes the fallacy of the stranger rape myth²⁶³ so ingrained is it in our cultural assumptions about sexual assault that it continues to condition responses to rape victims at all stages of the legal process. The argument is made here that the emergence of this particular stereotype can be understood, though not excused, within the context of mediaeval life. During the middle ages there was a general climate of sexual repression attributable to religious and social practices that disdained fleshly appetites, legitimate (marital) intercourse was narrowly circumscribed, to be engaged in only for the purposes of procreation or as a remedy for lust,²⁶⁴ the pool of potential partners was limited by political and class barriers and economic considerations tended to encourage late age at marriage. Several commentators have drawn a link between these factors and the view that, at that time, male sexual aggression was unexceptional.²⁶⁵ Violence towards women was tolerated or even approved as an aspect of the dominant masculine archetype²⁶⁶ and, where such behaviour did attract censure, it was on the grounds that it subverted the patriarchal ideal of the self-governed man rather than, as might be expected, its violence per se.²⁶⁷ Women could not expect to go about unmolested without an appropriate chaperone thus it was in their own interests to accept the protection of a male guardian. In this role of guardian a man not only defended the physical integrity of his dependents but also governed and controlled the activities of those under his roof, whether family or servants. Physical chastisement was permitted and would only become a matter for outside interference where it was excessive or where it was not administered for the purposes of correction.²⁶⁸

²⁶² See Temkin and Krahé, above n 24, 32 and the studies cited therein.

²⁶³ See Australian Bureau of Statistics 2010, *Recorded Crime - Victims*, Australia, cat no 4510.0, ABS, Canberra; Melanie Heenan and Suellen Murray, Statewide Steering Committee to Reduce Sexual Assault, *Study of Reported Rapes in Victoria 2000–2003 : Summary Research Report* (2006) 17; S Walby and J Allen, Home Office, *Domestic Violence, Sexual Assault, and Stalking. Findings from the British Crime Survey* (2004) 60.

²⁶⁴ McCarthy, above n 57, 32, citing St Augustine of Hippo.

²⁶⁵ See Edward Shorter, 'On Writing the History of Rape' (1977) 3(2) *Signs* 471, 474-5; Bullough and Brundage, above n 93, 135.

²⁶⁶ Bullough and Brundage, above n 93, 136.

²⁶⁷ See McSheffrey, above n 102, 174; Bullough and Brundage, above n 93, 136; Kathryn Gravdal, 'Chretien de Troyes, Gratian, and the Mediaeval Romance of Sexual Violence' (1992) 17(3) *Signs* 558, 585.

²⁶⁸ Goldberg, above n 103, 17.

A man was also able to exploit the power advantage he enjoyed over his servants since it was his duty to supervise their behaviour and they in turn were economically dependent on his continued good will. The theme of the innocent maid seduced by her master is a commonplace in mediaeval romance.²⁶⁹ It was accepted to such a degree, in fact, that it may have led to tacit cultural approval of sexual assaults on lower status dependent females. Therefore, the line between forced sex and seduction was particularly difficult to distinguish in such cases. Naturally the woman would be expected to protest but a society that identified strongly with the romantic seduction motif would interpret this as feigned modesty. Court records detail many such instances, although they often only come to light in bastardy depositions, that is, where the woman had conceived a child and was seeking support for that child.²⁷⁰ In other cases, where a sanction was imposed, the remedy was most commonly monetary compensation suggesting that the sexual assault was not regarded as a criminal offence.²⁷¹ The legitimacy of male sexual violence also extended to the marriage bed. According to canon law husband and wife owed to each other the 'conjugal debt',²⁷² thus neither could refuse the other's demands for sexual intercourse. Although this appears to be a rare example of equality between the sexes Elliott argues that the principle worked in the husband's favour since it failed to take into consideration the disproportionate consequences of sex for women as compared to men, as well as differences in sex drive, biological make-up and physical strength.²⁷³ Certainly there was no understanding of rape within marriage. Since a wife was bound to render the debt to her husband, should she refuse, he was entitled to resort to violence in exacting it.

In some ways, therefore, an entitlement to demand sexual favours was merely an incident of men's guardianship of their female dependents. As a result, contested domestic sexual interactions were difficult to classify and unlikely to be considered as rape. In contrast, sexual assaults committed by strangers were undeniably criminal. Such assaults were likely to occur outside the protective embrace of the master of the household. Accordingly, they were reprehensible on two fronts: as a violation of a woman who was 'off-limits' and, perhaps more importantly, as an affront to a man's rule over his household. The stereotypical rape script then, as now, could only accommodate

²⁶⁹ Phillips, above n 31, 95.

²⁷⁰ Bashar, above n 13, 36.

²⁷¹ McSheffrey, above n 102, 146.

²⁷² See generally Elizabeth M Makowski, 'The Conjugal Debt and Mediaeval Canon Law' (1977) 3(2) *Journal of Mediaeval History* 99.

²⁷³ Dyan Elliott, 'Sex in Holy Places' (1994) 6(3) *Journal of Women's History* 6, 18. See also Dyan Elliott, 'Bernardino of Siena Versus the Marriage Debt' in Jacqueline Murray and Konrad Eisenbichler (eds), *Desire and Discipline: Sex and Sexuality in the Premodern West* (University of Toronto Press, 1996).

those events that were susceptible of being so defined. In light of the arguments made above inevitably this script recognised only stranger rape as real rape.

2.7 Conclusion

This chapter has suggested that rape stereotypes, which are broadly discredited in modern times, may in fact have an historical foundation. At their genesis it may have been possible to explain such beliefs on the basis of particular social, religious and cultural realities. For example, false accusations of abduction were not unknown, the consequences of being discovered in a consensual sexual liaison were potentially catastrophic and it was almost a ‘cultural requirement’²⁷⁴ that women express reluctance to engage in sexual encounters. Although in some contemporary cultures women’s autonomy continues to be constrained, it is beyond question that many modern women enjoy an independence that their mediaeval sisters could not have imagined. As an apologia for rape stereotypes these antique realities are manifestly no longer valid in modern life. In general, there is no longer any shame attached to sex outside of marriage nor to a personal history that includes a succession of sexual partners. In very few societies does extra-marital sex entail punitive legal consequences.²⁷⁵ Women also enjoy much more economic freedom and government support to raise children on their own, at least relative to the women of the middle ages. And yet the acceptance of rape stereotypes persists. Attempts to re-draft sexual offences legislation in common law jurisdictions have taken many forms all of which, to a greater or lesser degree, acknowledge the fundamental need to tackle prejudicial assumptions about the reality of rape and the responses of rape victims. None of them, though, appear to acknowledge the mediaeval mindset that still infects some aspects of the prosecution of sexual offences. It may be that the continuing spectre of rape stereotypes in the courtroom gives cause to doubt the sincerity of official calls for their banishment and raises a suspicion that not all legal actors are convinced that they do not in fact reflect the reality of rape. This chapter argues that explicit acknowledgment that such beliefs about rape were only ever justified, if at all, under particular social conditions that have long since passed may be effective in overcoming the ignorance of members of the jury and of legal officers about the true face of sexual assault, its victims and its perpetrators.

²⁷⁴ See Louise M Sylvester, *Mediaeval Romance and the Construction of Heterosexuality* (Palgrave MacMillan, 2008) 39, 43.

²⁷⁵ It is acknowledged that these are contestable propositions in some cases. They generally hold good, though, for Western nations and in particular those common law countries whose legal systems constitute the main focus of this thesis.

The success of rape law reform efforts may be measured by the degree to which they undermine the influence of misogynistic attitudes in trials of sexual offences. Chapter 3 looks at examples of reform in a number of national and international jurisdictions that have tackled these problems and assesses the merits of these initiatives and how effectively they preclude the court's reliance on the myths about rape. It then places the Tasmanian reforms in context, explaining how they build on the experience of earlier reforms and avoid some of the problems that have been encountered in other jurisdictions. This chapter on the comparative law of rape and sexual assault demonstrates that the Tasmanian provisions go further than those that have preceded them and offer a significantly new direction in rape law reform. If the reforms are correctly interpreted and appropriately marshalled, discriminatory assumptions about female victims should be recast as an historical footnote to the law of rape.

Chapter 3: National and International Comparisons

3.1 Introduction

This chapter examines models of rape law reform in other jurisdictions and highlights both their strengths and their deficiencies in order to provide a frame of reference for the evaluation of the effectiveness of the Tasmanian reforms.²⁷⁶ In sexual offences trials the issue of absence of consent is a question of fact for the jury to adjudicate. Attempts at rape law reform will therefore be ineffective if they fail to deal with the difficulties posed by the jury's reliance on stereotypes about rape to determine the existence of this element. The previous chapter argued that explanations for the existence of these prejudices that operate in the assessment of culpability in sexual offences are only legitimate, if at all, in an historical context. This chapter analyses particular examples of legislative reform to ascertain their potential to exclude stereotypical reasoning that no longer has currency in modern sexual offences trials. It considers whether reform efforts that rely primarily on reform of the law itself have enjoyed any degree of success. It is suggested that, unless reforms to the law of rape effectively disarm these baseless stereotypes, the reformers' aims may remain unrealised. The initiatives are therefore scrutinised to determine whether they retain the imprint of historical attitudes or whether they establish that such attitudes will no longer operate in the prosecution of sexual offences.

²⁷⁶ The content of the Tasmanian reforms is discussed in detail in chapter 1.

Modern reform efforts may employ disparate discourses but at their heart they have all been animated by similar concerns. They have been critical of the construction of normal sexual relations on which rape laws are based; they have sought to overcome the difficulties of proving absence of consent within a legal regime that places the victim's character and behaviour under scrutiny in a way that allows her to be judged according to prejudicial assumptions about female sexuality, as if she, the *victim*, rather than the *accused* is on trial; they have recognised that the trial represents such an ordeal for the complainant that it discourages victims from reporting to police in the first place; and they have aimed to address the difficulties of securing a conviction in rape cases given the problematic understanding of the concept of consent and the way that the assessment of its existence in the context of claims of coerced sex will depend on the particular prejudices of jury members. The modern wave of rape law reform is conventionally sourced to the pioneering work undertaken in the US state of Michigan during the 1970s. The Michigan reforms were an attempt to alter the characterisation of sexual assault. Rather than being understood as a sexual act driven by undisciplined passion it was redefined as an act of violence. The reforms created a graduated series of gender neutral sexual offences, introduced a presumption of non-consent where the existence of force or coercion was established and implemented procedural reforms in the guise of rape shield legislation and the abolition of the corroboration warning.²⁷⁷ These reforms were propelled by a growing demand for change that recognised that the entrenched, narrow definition of rape with its insistence on proof of violence met with forcible resistance and an inherent suspicion of the female complainant did not reflect the reality of sexual assault for most victims and in fact acted as a barrier to achieving justice.

This chapter examines rape law reform in Australia and the other major common law jurisdictions. At the time of inception each of the models of reform was justified according to a particular theoretical rationale. Michigan, and New South Wales with the reforms of 1981 redrafted their sexual offences provisions to emphasise the violence of the offence rather than its sexual nature²⁷⁸ and attempted to shift the trial focus away from the question of the complainant's consent; Victoria, Tasmania, New South Wales with the reforms of 2007, the United Kingdom and Canada have focused on introducing a statutory definition of consent and giving substance to that definition by outlining circumstances which vitiate consent; and almost all jurisdictions have moved towards incorporating a degree of objectivity into either the mental element for the various sexual

²⁷⁷ Cassia C Spohn and Julie Horney, 'The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases' (1996) 86(3) *Journal of Criminal Law and Criminology* 861, 866.

²⁷⁸ The Criminal Code of Canada also defines sexual offences in terms of the degree of violence used. See *Criminal Code*, RSC 1985, c C-46, ss 271-3.

offences or the assessment of the accused's claims of a mistaken belief in consent. Wishing to avoid an unnecessarily repetitive and exhaustive account of all modern common law rape reform efforts, this chapter analyses individual initiatives as illustrations of the manifestation of a particular reform ideology.²⁷⁹ It considers both the soundness of the underlying theory and the effectiveness of its expression in the individual legislative instruments. The chapter concludes by noting that, whilst the Tasmanian legislation incorporates aspects of other reforms, it is unique in providing that there is no consent in the absence of verbal or physical communication of free agreement.²⁸⁰ This, in combination with the objective test in s 14A of the Criminal Code for mistaken belief in consent, constitutes a separate and additional category of reform.

3.2 Rape as Violence

3.2.1 Michigan Model Rape Legislation

The *Michigan Criminal Sexual Conduct Act 1974* introduced a series of sexual offences graded in terms of the objective seriousness of the circumstances of the crime.²⁸¹

Underlying these reforms was a characterisation of rape as an offence of violence rather

²⁷⁹ In the case of separate reform initiatives that exhibit conformity in approach, not every reform is analysed in detail. Instead, the most historically important, or the most recent, or the most influential example is considered. Consent is defined in all Australian jurisdictions in terms that are broadly consistent with the NSW definition in s 61HA(2) of the *Crimes Act 1900* (NSW). All Australian jurisdictions provide a non-exhaustive list of circumstances in which consent does not exist or in which an apparent consent is vitiated. Some replicate the situation at common law whilst others have extended the scope of vitiating circumstances. Section 128 of the *Crimes Act 1961* (NZ) creates the offence of 'sexual violation'. Absence of consent is an ingredient of the offence but consent is not defined. Instead s 128A provides enumerated circumstances in which consent does not exist. In 2005 the list of vitiating circumstances was considerably expanded: *Crimes Amendment Act 2005* (NZ) pt 1 item 7. The implications of expanding the list of circumstances which may vitiate consent is discussed in the context of the NSW reforms. In the Australian common law jurisdictions, with the exception of NSW, an honest belief in consent will be exculpatory although the wholly subjective test has largely been modified by statute. In the Code jurisdictions, this belief must be both honest and reasonable. New Zealand led the world in introducing as an ingredient of the offence an absence of reasonable grounds for belief in consent: *Crimes Amendment Act (No 3) 1985* (NZ) item 2. The implications of the reasonable grounds proscription and the different tests for the defence of mistake are analysed in the context of the current Victorian, NSW, UK and Canadian legislation. Reference is also made to the Tasmanian provision.

²⁸⁰ *Criminal Code* (Tas) s 2A(2)(a).

²⁸¹ 'First degree criminal sexual conduct referred to acts where: (i) the accused was armed; (ii) the offence occurred under circumstances involving the commission of any felony; (iii) the penetration was accomplished by force or coercion or as a result of the victim being mentally or physically incapacitated, and resulted in personal injury (defined to include mental anguish); or (iv) the accused was aided and abetted in the commission of the offence. Second degree criminal sexual conduct had a similar definition to first degree conduct, but covered non-penetrative sexual assaults. Third degree sexual conduct covered circumstances where the sexual penetration was achieved by means of coercion but did not result in personal injury. Finally, fourth degree conduct was similar to third degree conduct, but applied to non-penetrative sexual assaults.' Victorian Law Reform Commission (VLRC), *Sexual Offences Interim Report* (2003) 313, n 678.

than as a sexual offence, an approach that was grounded in the work of Brownmiller.²⁸² The prosecution was no longer required to prove absence of consent where it was established that there were circumstances of force or coercion, and additional coercive circumstances were not required to be proved where the assault was committed by an armed attacker or in the course of the commission of any felony.²⁸³ However, arguably the substance of the legislation undermined the aims of the reformers from the outset. For some, to equate sexual violence with other forms of non-sexual violence was to disregard the uniquely degrading nature of unwanted sexual penetration.²⁸⁴ In addition, the element of force or coercion was narrowly defined so that it continued to track the common law understanding of force or threats.²⁸⁵ The only other circumstances in which non-consensual penetrative sex was considered as serious as the former offence of rape were where the accused was armed, where the rape took place in the commission of any felony, where the victim was either mentally or physically incapacitated or where the accused was aided in the commission of the crime.²⁸⁶ In circumstances where sexual penetration was achieved by means of other forms of coercion, the offence was downgraded to a lesser degree of criminal sexual conduct which attracted a lighter maximum sentence. Along with a change of taxonomy the legislature did not take the opportunity to extend the categories of proscribed sexual conduct beyond the traditional understanding of rape but continued to assume that unwanted sex induced by other means did not violate the complainant in the same way.

²⁸² Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Simon and Schuster, 1975).

²⁸³ Meredith Carter, 'Judicial Sexism and Law Reform' (1991) 16 *Legal Services Bulletin* 29, 30.

²⁸⁴ See, eg, John Gardner, 'The Wrongness of Rape' in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 24–5; Rosemarie Tong, *Women, Sex, and the Law* (Rowman and Littlefield, 1984) 112–19.

²⁸⁵ The relevant sections are ss 520b(1)(f)(i)–(iv) of the *Criminal Conduct Act 1974*:

520(b)(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

²⁸⁶ See Victorian Law Reform Commission, above n 6.

Judges were also content to allow the defence of consent to be left for the jury to consider, regardless of the violence of the objective circumstances.²⁸⁷ Despite the absence of any reference to the victim's consent in the statute itself, courts accepted that consent could be a complete defence to a charge of criminal sexual conduct and several high profile decisions demonstrated that it might be so even in objectively threatening and violent circumstances. For example, in overturning a conviction for kidnapping and rape, the court in *People v Thompson*²⁸⁸ stated, '[w]e are not persuaded that consensual sexual intercourse is necessarily impossible in the course of kidnapping'.²⁸⁹ The decision in *Thompson* has been much criticised as have the Michigan reforms more broadly.²⁹⁰ The Law Reform Commission of Victoria added its voice to the criticisms arguing that, despite the intention to dispense with the requirement of proof of absence of consent, the question of the complainant's consent was still going to be critical in establishing the accused's culpability. Not only could consent in most cases be raised as a defence, in many instances the evidence relied upon to establish forced submission would, in any case, be the same as that which would have been relied on to establish absence of consent. In the Commission's view the coercive circumstances were 'in reality no more than indicators of lack of consent'.²⁹¹ Since consent remained an issue, there would be a continued focus on the complainant's behaviour and character as reliable evidence of consent.

Nevertheless, there are indications that the reforms were at least partly successful. Spohn and Honey in their study of rape cases both pre and post the 1975 reforms come to the tentative conclusion that, due to the re-casting of the definition of rape, women raped by unarmed acquaintances were more likely to report and police were more likely to regard these reports as genuine.²⁹² Dreisig found that, although conviction rates at trial decreased, many more cases were resolved by guilty pleas. In the first year of operation of the Criminal Sexual Conduct legislation the proportion of guilty pleas

²⁸⁷ Carter, above n 8.

²⁸⁸ 324 NW 2d 22 (Mich App, 1982).

²⁸⁹ Ibid 23–4. In what was arguably an even greater show of reluctance to embrace the reforms, in *People v Benard* 360 NW 2d 204 (Mich App, 1984) the Michigan Appeals Court strictly construed the requirement that the accused be armed such that it was not satisfied where one man held a loaded gun to the complainant's head whilst another man raped her: at 205. Estrich makes the point that where an accomplice merely holds the gun this is sufficient for a charge of armed robbery but apparently not sufficient to sustain a charge of rape; Susan Estrich, *Real Rape* (Harvard University Press, 1987) 85.

²⁹⁰ Estrich, above n 14, especially 81–8; Susan Caringella-MacDonald, 'The Comparability in Sexual and Nonsexual Assault Case Treatment: Did Statute Change Meet the Objective?' (1985) 31(2) *Crime and Delinquency* 206, 206–22; Jeanne C Marsh, Alison Geist and Nathan S Caplan, *Rape and the Limits of Law Reform* (Arbor House, 1982) 65.

²⁹¹ Victorian Law Reform Commission, *Rape: Reform of Law and Procedure: Interim Report*, Report No 42 (1991) 6.

²⁹² Spohn and Horney, above n 2, 883.

increased from 37% to 72%.²⁹³ Overall, however, empirical research conducted since the reforms has tended to confirm their limited success. Five years after the enactment of the model Michigan rape law Caringella-MacDonald conducted a study to determine whether the reforms had achieved the goal of preventing sui generis treatment of sexual assaults and to accord them like treatment with other categories of assault.²⁹⁴ The study revealed that, whilst comparability was observed in relation to the decision to charge, plea bargaining, and decisions to acquit, victims of sexual assaults were still more likely to have their credibility questioned or to be viewed as partly responsible for the assault.²⁹⁵

The clear implication is that the ‘historic difficulties in adjudicating sexual assault offences cannot be erased by the stroke of a pen’²⁹⁶ and that a simple change of label does not change the preconceptions that hamper the successful prosecution of these offences. Consistent with these findings Bachman and Paternoster found that the reforms had little effect on the rate of reporting or on the rates of conviction for non-traditional rapes.²⁹⁷ They did observe, however, a slight increase generally in the proportion of women reporting rape. This may suggest that, with an official statement that the question of the complainant’s consent assumes less significance, victims become more confident that the trial will not amount to a character assassination and, as a consequence, are more willing to report.²⁹⁸ The authors of this study also noted an increase in the proportion of offenders incarcerated for raping an acquaintance. They observed an 11% increase in the number of incarcerated acquaintance rapists while the number of reports of acquaintance rape victimisation only increased by 7%.²⁹⁹ However, the increase was minimal and there was still a pronounced ‘acquaintance discount’ for rape offences that was not present for other assaults.³⁰⁰ This suggests that the goal of treating sexual assaults and other forms of assault alike was not realised. Exceptionally, in sexual assault trials the question of the complainant’s personal characteristics and behaviour and how these relate to the issue of consent continued to be central concerns.

²⁹³ W P Dreisig, ‘Criminal Law — Sexual Offences — A Critical Analysis of Michigan’s Criminal Sexual Conduct Act’ (1976) 23 *Wayne Law Review* 203, 223.

²⁹⁴ Caringella- MacDonald, above n 15.

²⁹⁵ *Ibid* 219.

²⁹⁶ *Ibid* 220.

²⁹⁷ Ronet Bachman and Raymond Paternoster, ‘A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?’ (1993) 84(3) *Journal of Criminal Law and Criminology* 554, 573.

²⁹⁸ *Ibid* 574.

²⁹⁹ *Ibid* 571.

³⁰⁰ *Ibid* 572.

3.2.2 NSW — *Crimes (Sexual Assault) Amendment Act 1981*

The earliest Australian review of rape laws occurred in South Australia. Responding to a government reference, the Criminal Law and Penal Methods Reform Committee (the Mitchell Committee) undertook a substantial review of rape law in 1976. Its report³⁰¹ became a point of reference for reforms in other jurisdictions but it was not a catalyst for significant change in South Australia at that time.³⁰² New South Wales soon after became the first state to effect substantial changes to the law. Early reforms in New South Wales reconceptualised rape as essentially an act of violence, just as the Michigan initiatives had done. The enactment of the *Crimes (Sexual Assault) Amendment Act 1981* (NSW) abolished the common law offences of rape and attempted rape and replaced them with a number of statutory offences, creating a graded series of offences collectively labelled as sexual assaults.³⁰³ The hierarchy of the offences reflected the relative seriousness of the violence of the assault, evidenced by a graduated sentencing regime.³⁰⁴ Sexual assault category 1, inflicting grievous bodily harm with intent to have sexual intercourse, was the most serious offence followed by sexual assault category 2, inflicting or threatening to inflict actual bodily harm with intent to have sexual intercourse.³⁰⁵ Sexual intercourse was defined in s 61A to include penetration by an object and parts of the body other than the penis that were not overtly sexual. This emphasised the reformers' position that sexual assaults are more accurately explained as a desire for domination and control than as a lust-induced loss of self-control. If rape is understood as an act of violence then the question of consent should be sublimated to a consideration of the existence of objective evidence of violence, such as evidence of force, threats or injury. It was also thought that by using the terminology of assault the perceived stigma attached to victims of rape might be avoided.³⁰⁶ The offence of sexual intercourse without consent was retained as the third category of sexual assault to cover situations where no objective evidence of violence existed.³⁰⁷ The Crown was not required to prove absence of consent in the first

³⁰¹ Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report on Rape and Other Sexual Offences* (1976).

³⁰² See M Heath and N Naffine, 'Men's Needs and Women's Desires: Feminist Dilemmas about Rape Law Reform' (1994) 3 *Australian Feminist Law Journal* 30, 50.

³⁰³ *Crimes Act 1990* (NSW) ss 61B–E, as amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 item 4.

³⁰⁴ Prior to the reforms rape was punishable by life imprisonment. The newly structured offences introduced graded statutory maximum sentences.

³⁰⁵ *Crimes Act 1990* (NSW) ss 61B–C, as amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 item 4.

³⁰⁶ Greg Woods, Department of the Attorney General and of Justice, *Sexual Assault Law Reforms in New South Wales: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981 and the Cognate Act* (1981).

³⁰⁷ *Crimes Act 1990* (NSW) s 61D, as amended by *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 item 4. The fourth category, in s 61E, dealt with indecent assaults.

two categories of sexual assault, only that the relevant harm was inflicted with the intention of having sexual intercourse. At the same time procedural law was also amended to introduce restrictions on the admissibility of sexual history evidence and to remove the mandatory corroboration warning.

These reforms enjoyed some success in improving both reporting and conviction rates but the reason for this improvement is not clear. It may have been attributable to the wider definition of sexual intercourse in s 61A which brought more sexual acts within the reach of the legislation, it may have been a consequence of the associated growth in sexual assault units and other support services or it may have been that the differentiated structure of sexual assault offences encouraged women to report non-stereotypical incidents of sexual assault and also encouraged police to accept them as genuine.³⁰⁸ Tellingly perhaps, the most significant increase was in the number of reports regarded as genuine by police. This suggests that the flow on effects of an increased willingness by police to institute criminal investigation processes may have been instrumental in achieving the higher conviction rates that were observed in the monitoring report. The increase may therefore have been a reflection of the more extensive training officers received in relation to sexual offences rather than the reforms per se.³⁰⁹

The implementation of the substantive law was less successful. By re-conceptualising the offence of rape as a graduated series of violent assaults it was not clear whether prosecution authorities were required to select a single category of offence with which to charge the offender or whether the different categories of sexual assault were discrete offences, which could constitute separate charges on an indictment. The uncertainty was compounded by the fact that sexual assaults categories 1 and 2 require proof of intent to have sexual intercourse rather than proof of penetration. Was it therefore permissible to take into account the fact of a completed act of sexual intercourse for sentencing purposes if the accused was convicted only on a charge of sexual assault category 1 or 2? This question was apparently resolved in *R v Smith*,³¹⁰ with comments of Street CJ suggesting that, where there is evidence of both completed intercourse and injury the sexual intercourse should be the subject of a separate charge under category 3.³¹¹ It followed that, if the fact that intercourse had taken place was to be taken into account, category 3 (sexual intercourse without consent) must be charged

³⁰⁸ Roseanne Bonney, NSW Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation: Interim Report No 2*, (1985) 62–4.

³⁰⁹ Roseanne Bonney, NSW Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation: Interim Report No 1* (1985) 11–12; Bonney, above n 33, 63.

³¹⁰ [1982] 2 NSWLR 569.

³¹¹ Ian Cunliffe, 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8 *Criminal Law Journal* 271, 282.

separately. Contrary to parliament's intent, the complainant's character and behaviour would, in those circumstances, again become the primary focus of jury deliberations on the ingredient of absence of consent. Arguably, this was not necessarily problematic: category 3 was the least serious category of sexual assault and the substantial penalties for categories 1 and 2 adequately reflected the seriousness of the totality of the acts whether category 3 was charged separately or not.³¹² But in fact an evaluation of the reforms undertaken by the New South Wales Bureau of Crime Statistics and Research (BOCSAR) concluded that very few cases involved objective evidence of violence, such as injury. The offence most commonly charged was category 3 sexual assault and as a result, the issue of the complainant's consent would, in most cases, remain at the heart of the trial.³¹³

There were other shortcomings evident in the amended legislation. Since the concept of consent was not defined, there was little to prevent the old stereotypes and rape myths that colour the common law principles relating to vitiation of consent remaining influential in sexual assault cases. Apart from extending the circumstances vitiating consent to include, in s 61D (3)(a)(2), fraud as to the fact of marriage, the circumstances or pressures sufficient to vitiate consent were not significantly developed beyond the restricted common law categories of threats, terror or fraud. An additional criticism of the reforms was that, by casting the offence of inflicting grievous bodily harm with intent to have sexual intercourse as the most serious category, the implication was that non-violent rape was objectively less serious.³¹⁴

3.2.3 NSW — *Crimes (Amendment) Act 1989*

Later amendments to the *Crimes Act 1900* (NSW) preserved a tenuous link with the earlier motivating ideology of rape as violence. The different categories of sexual assault were replaced by the *Crimes (Amendment) Act 1989* (NSW) with three basic offences: sexual assault, indecent assault and act of indecency.³¹⁵ The amendments also introduced

³¹² Helen L'Orange and Sandra Egger, 'Adult Victims of Sexual Assault: An Evaluation of the Reforms' in Sydney Institute of Criminology (ed), *Proceedings of a Seminar on Sexual Assault Law Reform in the 1980s: To Where from Now?* (Institute of Criminology, University of Sydney, 1987) 12, 31.

³¹³ In the BOCSAR study 60% of cases presented at Committal involved completed or attempted acts of sexual intercourse without consent. Roseanne Bonney, NSW Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation: Interim Report 2 – Sexual Assault, Court Outcome: Acquittals, Convictions and Sentence* (1985) 8.

³¹⁴ Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1995) 18 *Criminal Law Journal* 249, 249.

³¹⁵ *Crimes Act 1900* (NSW) s 61I, 61L, 61N, as amended by *Crimes (Amendment) Act 1989* (NSW) sch 1 item 3.

the offence of assault with intent to have sexual intercourse.³¹⁶ They were promoted as a simplification of the categories and a clarification of the law relating to sexual assaults.³¹⁷ However, perhaps signalling a move away from the principles that had animated the Michigan reforms, the requirement to prove absence of consent in charges of aggravated sexual assault, for example in circumstances where actual bodily harm was inflicted on the complainant, was re-introduced. Consent was not defined, instead the common law interpretation of consent continued to apply. The correctness of the reliance on the common law understanding was confirmed in the case of *R v Mueller*,³¹⁸ with Studdert J adopting King CJ's statement on the issue in *Question of Law (No 1 of 1993)*.³¹⁹ King CJ said:

Consent must be a free and voluntary consent ... That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.³²⁰

It has been suggested that the common law formulation of consent as expressed in *Mueller* in certain situations may be logically inconsistent. Depending on where the boundaries of improper persuasion are positioned consent may be considered free and voluntary even when grudgingly given in response to overwhelming pressure. Sex under these conditions can only be characterised as consensual if the normative view of sexual relations accords with what has been termed 'the penetrative/coercive'³²¹ model of sexual relations. This version of normative sexuality is predicated on an aggressive male role in sexual relations and a passive or acquiescent female role. In this account of gender relations the only appropriate female behaviour is to maintain an appearance of sexual unavailability unless and until persuaded to grant consent. The inconsistency in the *Mueller* formulation is that a coerced consent cannot at the same time be regarded as a freely and voluntarily granted consent.

Both the Michigan and New South Wales initiatives aimed to de-prioritise consent as an ingredient to be proved in rape-type offences but neither succeeded in doing this. The 1989 amendments to the New South Wales *Crimes Act 1900* amount to a retreat from the radical reforms of 1981 in that they reinstated consent as the crucial determinant of legitimacy. This may have been due to a realisation that inevitably

³¹⁶ *Crimes Act 1900* (NSW) s 61K, as amended by *Crimes (Amendment) Act 1989* (NSW) sch 1 item 3.

³¹⁷ Pia Salmelainen and Christine Coumarelos, 'Adult Sexual Assault in NSW' (1993) 20 *Contemporary Issues in Crime and Justice* 1.

³¹⁸ (2005) 62 NSWLR 476.

³¹⁹ (1993) 59 SAR 214.

³²⁰ *Ibid* 220.

³²¹ Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 26, 27.

absence of consent would be contested in the courtroom³²² but there are also cogent philosophical arguments against dispensing with the notion of consent as the signifier of legitimate sex. As Munro states, ‘some concept of consent is needed to allow people to act, and be respected, as moral agents who police the boundaries of their own personal intimacy by inviting as well as denying sexual access.’³²³ She argues that consent should not be abandoned in the context of sexual offences but instead should be reformulated to account for the personal, social and relational factors that influence any decision to agree to engage in sexual activity.³²⁴

Some 20 years after the 1989 amendments, New South Wales re-visited rape law reform but these reforms were informed by a different philosophical perspective. The failure of the earlier efforts to diminish the importance of the complainant’s consent in sexual offence law prompted a shift in approach, and Parliament instead decided to follow the example set by other jurisdictions and define with greater precision the concept of consent. The concern with defining consent was a concomitant of the reframing of the wrong of sexual assault that began to occur in the 1990s. If the earlier reforms had treated rape as a crime of physical violence, the next wave judged it primarily as a violation of individual autonomy. The critical determinant of illegal sexual conduct was thus proof of the presence of fetters on the expression of that autonomy via the mechanism of consent.

3.3 Statutory Definition of Consent

3.3.1 Victoria — *Crimes (Rape) Act 1991*

Victoria was the first of the Australian states and territories to introduce a statutory definition of consent. The *Crimes (Rape) Act 1991* (Vic) engaged with the task of defining consent in rape trials in three ways. It adopted a positive consent standard (free agreement) in s 36,³²⁵ it set out a non-exhaustive list of circumstances that would vitiate consent³²⁶ and it provided in s 37(a) for mandatory jury directions in relation to the meaning of consent and free agreement in appropriate cases.³²⁷ It was this last approach

³²² See, eg, Jennifer Temkin, *Rape and the Legal Process* (Oxford University Press, 2002) 176.

³²³ Vanessa E Munro, ‘Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy’ (2008) 41 *Akron Law Review* 923, 940. Munro is here referencing the work of John Gardner and Stephen Shute, ‘The Wrongness of Rape’ in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford University Press, 2000) 193, 207–8.

³²⁴ *Ibid* 941.

³²⁵ *Crimes Act 1958* (Vic) s 36, as inserted by *Crimes (Rape) Act 1991* (Vic) sch 1 item 3.

³²⁶ *Crimes Act 1958* (Vic) ss 36(a)–(g), as inserted by *Crimes (Rape) Act 1991* (Vic) sch 1 item 3.

³²⁷ *Crimes Act 1958* (Vic) s 37(a), as inserted by *Crimes (Rape) Act 1991* (Vic) sch 1 item 3.

that was perhaps the most ground breaking. In accordance with the terms of s 37(a) the suggested direction was in the following form:

[T]he fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without a person's free agreement.

The effect of this direction was to introduce a presumption of non-consent where there was otherwise no indication of consent from the complainant, either physical or verbal. This amounted to a radical departure from the prevailing legal understanding that consent could be inferred from the absence of dissent. Defendants had previously been able to rely on evidence of lack of resistance by the complainant as the basis for the defence of an honest and reasonable belief in consent. Now such a belief would not be reasonable unless it was based on evidence of the positive communication of consent. Defining consent in terms of free agreement emphasised that the legislation embodied an affirmative consent standard that precludes arguments that submission equates with consent.

3.3.1.1 Criticisms

These amendments were not universally welcomed or approved. Some critics of the legislation maintained that it was politically motivated, concerned less with enacting substantial reform than with demonstrating that the government was at least doing *something* about the problem of sexual assault.³²⁸ There was a mixed reaction to the insertion of a legislative definition of consent in s 36. An evaluation report undertaken by Heenan and McKelvie for the Department of Justice found that solicitors and magistrates were generally approving, but there was much less acceptance from judges and barristers.³²⁹ Unsurprisingly perhaps, defence barristers were generally opposed to the definition, some suggesting that in some cases the definition would make their case 'virtually impossible to defend'.³³⁰ Those barristers who voiced some support were mainly prosecution barristers. For them the definition made it easier to prove absence of consent.³³¹ The mandatory jury directions in s 37(1)(a) attracted much more emphatically negative comment from legal personnel. Nearly 50% of the practitioners and judges surveyed in Heenan and McKelvie's report opposed the form of the jury directions.³³² The major objection was that the directions did not realistically reflect most individual's

³²⁸ M Heenan and H McKelvie, Rape Law Reform Evaluation Project, Department of Justice (Vic), *The Crimes (Rape) Act 1991: An Evaluation Report: Report No 2* (1997) 303.

³²⁹ Ibid, 305–8.

³³⁰ Ibid, 308.

³³¹ Ibid, 309.

³³² Ibid 317.

experiences of normal sexual encounters. As one barrister remarked, ‘I hazard a guess that in a vast number of sexual encounters there is nothing said one way or another about agreement or no agreement.’³³³ This comment ignores the fact that these jury directions only arise in a legal context where the consensual nature of the encounter is in dispute. Therefore, considerations that might be relevant to normal, healthy, consensual sexual conduct do not apply. It also implies that the legislation set out a requirement of verbal communication of consent which it did not. Fundamentally, though, criticisms like this betray a continuing endorsement of a normative view of coercive sexuality. If one accepts a deterministic explanation of gender roles in sexual encounters, where man is aggressive and woman is passive, then it is an unnatural distortion of these roles to require that a woman affirmatively convey her consent. The answer to these objections lies however in the very purpose of the legislation itself. The legislature was fully cognisant of the difficulties of obtaining a conviction when individual jury members are socialised to accept ‘a certain amount of coercion, aggression or violence against women as a normal, even desirable, part of sexual encounters.’³³⁴ A positive consent standard and mandatory jury directions on consent were intentionally adopted to effect change in social attitudes³³⁵ and in the hopes that they would serve an educative purpose — to rid rape laws of outmoded and prejudicial understandings of women’s lack of agency in their sexual life and to change the conception of normal sex on which those laws are based.

3.3.1.2 Further Amendments

Just how difficult a task such social change presented was confirmed by the need for subsequent amendments to the *Crimes Act 1958* in 2006 and again in 2007. These amendments were the direct result of Victorian Law Reform Commission (VLRC) recommendations presented in a report on the operation of the amended sexual offences provisions.³³⁶ One of the principal aims of the 2006 amendments was to emphasise the educative aspect of the sexual offences legislation and to advance further the notion of communicative sexuality. The original formulation of s 37(1)(a),

³³³ Ibid.

³³⁴ Lani Anne Remick, ‘Read Her Lips: An Argument for a Verbal Consent Standard in Rape’ (1993) 141(3) *University of Pennsylvania Law Review* 1103, 1104.

³³⁵ The Victorian Law Reform Commission, commenting on its recommendations to State Parliament in relation to jury directions stated: ‘it is not acceptable for men to cling to outdated myths about seduction, sexual conquest and female sexuality’: Victorian Law Reform Commission, *Rape: Law Reform and Procedure*, Report No 43 (1991) 16.

³³⁶ Victorian Law Reform Commission, *Sexual Offences Law and Procedure*, Final Report (2004).

[t]he fact that a person did not say or do anything to indicate free agreement to a sexual act is *normally* enough to show that the act took place without that **person's free agreement**³³⁷

had suggested that in an *unusual* case an accused would be able to rely on an inference of free agreement, even where the other party had given no indication one way or the other. The VLRC argued that such an outcome would be contrary to the idea of communicative sexuality that underpinned the reform efforts.³³⁸ And so the word 'normally' was omitted.

The legislature further amended s 37 to require that the indication of consent be given 'at the time at which the act took place'.³³⁹ Such a requirement would preclude an accused from arguing consent or a belief in consent by pointing out that the complainant had at first expressed a willingness to engage in particular sexual conduct, which she later withdrew. Together with the amendments to s 37, statements of the objectives and guiding principles of the legislation were inserted in s 37A and s 37B respectively. These sections are a clear expression of the aims of the reforms, and s 37B in particular attempts to counteract prejudicial juror assumptions about sexual assault that seem to present such an obstacle to conviction. Section 37B requires the courts, in interpreting the sexual offences provisions in the *Crimes Act*, to have regard to such factors as the significant underreporting of sexual assault,³⁴⁰ the fact that offenders are commonly known to their victims³⁴¹ and the fact that there is often unlikely to be physical evidence of the assault.³⁴²

The sexual assault provisions in the *Crimes Act* were most recently revisited in 2007. Section 37 has been substantially amended and now contains precise directions on the matters relating to consent on which the judge must instruct the jury.³⁴³ Thus, a judge must only give a direction on consent where such a direction is relevant to the facts in issue and must relate that direction explicitly to the particular facts in issue and the specific elements of the offence to which the direction is relevant.³⁴⁴ Properly marshalled, these provisions should provide an opportunity to focus jurors' attention on the legal notion of consent and alert them to the inappropriateness of applying their domestic understanding of consent to consideration of the issue of absence of consent. As s 37 states, these measures have been adopted 'to aid the jury's comprehension of the direction'. The definition of consent and the vitiating circumstances in s 36 remain

³³⁷ *Crimes Act 1958* (Vic) s 36, as inserted by *Crimes (Rape) Act 1991* (Vic) sch 1 item 3 (emphasis added).

³³⁸ Victorian Law Reform Commission, above n 60, 351–2.

³³⁹ *Crimes Act 1958* (Vic) s 37(1)(a), as amended by *Crimes (Sexual Offences) Act 2006* (Vic) pt 2 item 4.

³⁴⁰ *Crimes Act 1958* s 37B(b) inserted by *Crimes (Sexual Offences) Act 2006* pt 2 item 5.

³⁴¹ *Crimes Act 1958* s 37B(d) inserted by *Crimes (Sexual Offences) Act 2006* pt 2 item 5.

³⁴² *Crimes Act 1958* s 37B(e) inserted by *Crimes (Sexual Offences) Act 2006* pt 2 item 5.

³⁴³ *Crimes Act 1958* s 37 inserted by *Crimes Amendment (Rape) Act 2007* item 3.

³⁴⁴ *Crimes Act 1958* s 37(2) inserted by *Crimes Amendment (Rape) Act 2007* item 3.

unchanged but their effect has arguably been bolstered by the insertion of s 37AAA. Section 37AAA is a deeming provision and it provides that as a matter of law the circumstances set out in s 36 are evidence of absence of consent. It further provides that, where the existence of one of these circumstances is established beyond reasonable doubt ‘the jury must find that the complainant was not consenting’.³⁴⁵ The prescriptive nature of this provision precludes the jury from adhering to traditional views about the interplay between the nature and quantum of force or threat, and the absence of consent. In addition, the removal from the jury of the freedom to draw their own conclusions about the significance of, for example, the fact that the complainant was substantially intoxicated, underscores the educative purpose of the legislation. It is one more step in constructing a robust foundation of communicative sexuality that the legislature has adopted as the standard in sexual relations.

The legislative amendments were part of the Victorian Department of Justice’s system wide response to sexual offences, the Sexual Assault Reform Strategy (SARS). An evaluation report commissioned by the Department found that, generally, SARS has resulted in improvements in the experience of reporting sexual offences for victims.³⁴⁶ However, the report also notes that the effectiveness of legislative amendments in relation to jury directions on consent remains subject to Court of Appeal decisions.³⁴⁷ A recent widely criticised decision overturning a conviction for rape, signals that courts may be willing to interpret the consent provisions in a way that is seemingly at odds with the communicative standard. In a case alleging the rape of a sleeping victim³⁴⁸ the Court of Appeal held that the trial judge’s directions in relation to the element of mens rea precluded juror consideration of the possibility that, whilst the accused was aware that the complainant might be asleep, it might also be a reasonable possibility that he believed she was awake. In a passage that is difficult to reconcile with the spirit of the legislation, Buchanan JA stated:

Critically, during these manoeuvres, which involved a degree of physical manipulation by the applicant, *there was no demur on the part of the complainant*. The jury may have concluded that there was no protest by the complainant because she was asleep. Equally, if they had been properly instructed, the jury may have concluded that the applicant thought that the complainant might have fallen asleep but accepted that it was a reasonable possibility that the applicant believed that she had finally consented.³⁴⁹

³⁴⁵ *Crimes Act 1958* (Vic) s 37AAA(c).

³⁴⁶ Success Works Pty Ltd, Department of Justice (Vic), *Sexual Assault Reform Strategy: Final Report* (2011).

³⁴⁷ *Ibid* 216.

³⁴⁸ *Getachew v R* [2011] VSCA 164.

³⁴⁹ *Ibid* [25] (emphasis added).

Awareness of the possibility that the complainant was asleep was held to be insufficient to constitute the mens rea of the offences of rape. Special leave to appeal has since been granted by the High Court³⁵⁰ so the authoritative interpretation of the provisions remains unresolved.

3.3.2 NSW — Crimes Amendment (Consent–Sexual Assault Offences) Act 2007

New South Wales is the latest Australian jurisdiction to introduce a statutory definition of consent. Consent is now defined in s 61HA(2) of the *Crimes Act 1900* in terms of free and voluntary agreement.³⁵¹ This amendment followed a series of reports by different criminal justice research bodies, expressing a common concern with the problems of establishing absence of consent in rape trials and indeed the difficulties inherent in prioritising absence of consent. All the reports advocated legislative reform in the area of sexual offences laws.³⁵² In particular, the Adult Sexual Assault Interagency Committee proposed that three areas should be the focus for change: the adoption of a statutory definition of consent; an expansion of the circumstances where consent would be presumptively vitiated and the introduction of an objective fault element in relation to mistaken belief in consent.³⁵³ In response, in 2007, the New South Wales government tabled the Crimes Amendment (Consent–Sexual Assault Offences) Bill. Consent is defined in s 61HA(2) as follows:

A person ‘consents’ to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

There are now two categories of circumstances which negate consent: those in which there is no consent; and those where apparent consent may be vitiated. In accordance with s 61HA(4), there is no consent:

- (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
- (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep or
- (c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or

³⁵⁰ *R v Getachew* [2011] HCATrans 275 (29 September 2011).

³⁵¹ *Crimes Act 1900* (NSW) s 61HA(2).

³⁵² See Adult Sexual Assault Interagency Committee (NSW), *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004); Criminal Justice Sexual Offences Taskforce, Attorney-General’s Department (NSW), *Responding to Sexual Assault: The Way Forward* (2005); Criminal Law Review Division, Attorney General’s Department (NSW), *The Law of Consent and Sexual Assault: Discussion Paper* (2007); Natalie Taylor, ‘Juror Attitudes and Biases in Sexual Assault Cases’ (2007) 344 *Trends and Issues in Crime and Criminal Justice* 1.

³⁵³ Adult Sexual Assault Interagency Committee, above n 77, 31.

(d) if the person consents to the sexual intercourse because the person is unlawfully detained.

In accordance with s 61HA(6) consent may be vitiated:

- (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
- (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
- (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.

Advocates of a statutory definition of consent considered that it would standardise jury directions on consent and help to educate the public about the type of objective factors which might be indicative of valid consent in the legal context. Detractors argued that the definition, borrowed as it was from other jurisdictions, was at odds with the way the common law definition had evolved in New South Wales.³⁵⁴ Considering that the aim of the reforms was ‘to enact a more contemporary and appropriate definition than is currently available under the common law’,³⁵⁵ the latter objection would seem to be misconceived. A further objection was that the definition did not provide clarity about the issue of consent. Since the definition gave no guidance about the nature of permissible constraints on freedom or voluntariness, it did not resolve the question of the validity of consent which was given in response to persuasion.³⁵⁶

3.3.2.1 Automatic Negation of Consent

In answer to the latter criticism, it is now the case that guidance is provided in the form of the expanded list of circumstances which negate consent. The amended Act contains, in ss 61HA(4)–(5), a catalogue of situations where the victim’s consent will be presumptively negated. Accordingly, the Crown is entitled to rely on proof of the relevant circumstance as proof of absence of consent. The enumerated circumstances are examples of perhaps the most common situations in which agreement is not freely given but the provision emphasises that the list is not exhaustive. The amended provisions are more extensive than the previous corresponding provision, s 61R, which was essentially a statutory rendering of the relevant common law principles, viz, only mistakes as to the nature or purpose of the act, mistakes as to the identity of the other person, or the presence of sufficient force or threats of force would vitiate consent. In particular the circumstances in which consent will be presumptively negated have been expanded to include the circumstances that the victim is unlawfully detained and, due inter alia to

³⁵⁴ Criminal Justice Sexual Offences Taskforce, above n 77, 34.

³⁵⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 7 November 2007, 3584 (John Hatzistergos, Attorney General).

³⁵⁶ Criminal Justice Sexual Offences Taskforce, above n 77, 34.

cognitive or age incapacity, the victim does not have the capacity to consent. It may be thought that it is already implicit in defining consent in s 61HA(2) as ‘free and voluntary agreement’ that the victim has the capacity to give consent and that a wide variety of constraints would illegitimately undermine that capacity. But at least one commentator has suggested that s 61HA(4)(a) may in effect ‘counter the generality of s 61HA(2)’.³⁵⁷ Since s 61HA(4)(a) adverts to the negation of consent due to cognitive or age incapacity, it at least opens up the possibility that if s 61HA(2) is construed in the light of s 61HA(4)(a), the assessment of whether agreement is free and voluntary will be restricted to considerations of cognitive or age incapacity, whereas the intention was that the provision operate more broadly.

Section 61HA(4) is also potentially problematic because of its prescription of a causal connection between the listed circumstances and the granting of consent. For example, s 61HA(4)(c) provides that a person does not consent to sexual intercourse ‘if the person consents ... *because* of threats of force or terror’ (emphasis added). This may suggest to jurors that, even where they are satisfied of the concurrency of absence of consent and the existence of threats, they may legitimately maintain doubts about a causative connection based on old discredited assumptions. So, for example, where there is evidence that the complainant was physically threatened and submitted to sexual intercourse, if the trier of fact believes that women enjoy forceful sex, the nexus between the threat and the granting of consent cannot be established.

3.3.2.2 Possible Negation of Consent

Along with the new categories of presumptive negation of consent there are now additional categories which, whilst not generating a presumption of absence of consent, nevertheless constitute indicia of non-consent. These are contained in s 61HA(6). The self-intoxication of the victim,³⁵⁸ non-violent threats³⁵⁹ and the abuse of a position of authority or trust³⁶⁰ are grounds on which it may be established that a person did not validly consent. The principle that non-violent threats will vitiate consent is not novel in the context of the *Crimes Act 1900*, however the impact of such threats on an accused’s culpability for a sexual offence was previously governed by s 65A, since repealed.³⁶¹ Section 65A created the less serious offence of sexual intercourse procured by

³⁵⁷ Ian Dobinson and Lesley Townsley, ‘Sexual Assault Law Reform in New South Wales: Issues of Consent and Objective Fault’ (2008) 32 *Criminal Law Journal* 152, 155.

³⁵⁸ *Crimes Act 1900* (NSW) s 61HA(6)(a).

³⁵⁹ *Ibid* s 61HA(6)(b).

³⁶⁰ *Ibid* s 61HA(6)(c).

³⁶¹ *Crimes Act 1900* (NSW) s 65, as repealed by *Crimes Amendment (Consent-Sexual Assault Offences) Act 2007* (NSW) sch 1 item 3.

intimidation, coercion and other non-violent threats, an offence punishable by a maximum of six years imprisonment. These circumstances are now subsumed into the consent provisions relating to the graded sexual assault offences, which attract maximums of between 14 years and life imprisonment. Juries no longer have the opportunity to convict of a lesser offence in circumstances that may be regarded by some as less objectively serious, for example where there is an absence of violence or where the victim has already acquiesced in sexual activity short of penile penetration. Whilst it may be argued that some account of the objective seriousness of the circumstances of the assault can be made in sentencing, it remains the case that 'juries may be reluctant to convict for serious crimes ... where they perceive that an offender is perhaps less blameworthy'.³⁶² This is a common justification for a two-tiered offence of rape, with only violent or stranger rapes attracting the maximum penalty. However, as Temkin asserts, legislation framed in this way,

would undermine a woman's right to choose whether to have sexual intercourse no matter what the circumstances and would condone in some measure the conduct of a man who denies her that choice.³⁶³

It is argued that Parliament was right to repeal s 65A as, in effect, it downplayed the trauma suffered by victims of non-violent coerced sex. In such cases, as in cases of violent coercion, the question for the jury now is, whether, in the light of such threats, the complainant can still be said to have given free and voluntary agreement.

Both the provisions dealing with non-violent threats and the abuse of a position of authority or trust³⁶⁴ stipulate a causal link between consent to sexual intercourse and the vitiating circumstance. That is, the Crown must demonstrate that sexual intercourse occurred *because* of the threats or abuse of a position of power. No such causal link is stipulated, however, where the Crown seeks to rely on the victim's intoxication by alcohol or drugs to negate consent. Section 61HA(6)(a) states that a person's consent may be negated:

If the person has sexual intercourse *while* substantially intoxicated by alcohol or any drug (emphasis added).

³⁶² Dobinson and Townsley, above n 82, 157. See also Leslie Robinson, 'It is What it is: Legal Recognition of Acquaintance Rape' (2008) 6(2) *Ave Maria Law Review* 627, 653; C E Wells and E E Motley, 'Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation' (2001) 81(1) *Boston University Law Review* 127, 154; Jennifer Temkin, 'Towards a Modern Law of Rape' (1982) 45(4) *The Modern Law Review* 399, 419.

³⁶³ Temkin, above n 87.

³⁶⁴ It remains to be seen how the abuse of position provision will be construed in New South Wales. If the approach adopted in Tasmania is followed, it may be construed narrowly. See Terese Henning, 'Case and Comment – *Pafitis*' (2001) 25 *Criminal Law Journal* 162.

Whilst it is clear that no direct causal link is mandated between the fact of substantial intoxication and the granting of consent it is equally clear that intoxication can only be relevant in so far as it relates to the quality of that consent. The question for the jury must therefore be whether the intoxicated complainant nevertheless freely and voluntarily agreed to sexual intercourse. Such a determination will be unproblematic where the complainant is rendered asleep or unconscious due to the effects of alcohol or drugs and in any case such a situation would presumably trigger the operation of s 61HA(2) which defines consent in terms of free and voluntary agreement, and s 61HA(4)(b) which deems that consent is absent if the person is asleep or unconscious. Whether substantial intoxication falling short of these extremes has rendered the complainant incapable of giving free and voluntary consent remains a jury question, the determination of which will be influenced by both the particular prejudices of individual jurors and the clarity of the judge's directions to them. Since a nexus between the fact of the complainant's substantial intoxication and the granting of consent is not stipulated there is a risk that defendants may be convicted for engaging in sex with someone who is intoxicated but who would have in any case agreed to sex if she was sober. Admittedly the risk is small, considering the likelihood of victim-blaming in such a scenario³⁶⁵ but it does raise the possibility of the 'extension of the criminal law to catch people who might not otherwise be regarded as criminals'.³⁶⁶ A provision such as that in s 2A(2)(a) of the Tasmanian Criminal Code requiring an affirmative communication of consent would help to secure fairness to both the accused and the complainant in such circumstances. Rather than considering whether a conscious, intoxicated complainant was deprived of the capacity to consent, the jury's enquiry would focus on the arguably less problematic question of the existence of evidence of affirmative consent. There would be no legal prohibition on consensual, intoxicated sex, as long as there was evidence of positive, free agreement.

3.3.3 United Kingdom —*Sexual Offences Act 2003*

The United Kingdom has also pursued the model of a statutory definition of consent operating in conjunction with the 'category approach'³⁶⁷ of enumerating circumstances where a presumption of absence of consent operates. The UK *Sexual Offences Act 2003*

³⁶⁵ See, eg, Steffen Bieneck and Barbara Krahé, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?' (2011) 26(9) *Journal of Interpersonal Violence* 1785.

³⁶⁶ Dobinson and Townsley, above n 82, 158–9. See especially the author's discussion of *R v Bree* [2007] 3 WLR 600.

³⁶⁷ See Jennifer Temkin, 'Literature Review of Research into Rape & Sexual Assault: A Report Commissioned by Research, Development and Statistics Directorate of the Home Office for the Review of Sexual Offences' in *Setting the Boundaries: Reforming the Law on Sexual Offences: Volume 2* (Home Office, 2000).

(SOA) shares some common ground with the New South Wales *Crimes Act 1900* with its two-tiered approach to these presumptions. Where the New South Wales legislation distinguishes between circumstances in which a person does not consent and circumstances where it may be established that they do not consent³⁶⁸ the UK approach is to classify the presumptions as either evidential or conclusive. The evidential presumptions generate a presumption of absence of consent and knowledge of absence of consent in specified circumstances unless sufficient evidence is adduced by the defence to raise the issue of consent or reasonable belief in consent. The conclusive presumptions generate a presumption of absence of consent in specified circumstances that cannot be rebutted by evidence adduced by the defence. The evidential presumptions relating to consent are contained in s 75 and the conclusive presumptions are contained in s 76. Generally, the evidential presumptions relate to circumstances of force or threats of force and victim incapacity. For example, in accordance with s 75, evidence that the complainant was asleep or unconscious or that she was subjected to violence will give rise to an evidential presumption that she did not consent. Section 76 provides that absence of consent will be conclusively presumed in two situations: where the accused has intentionally deceived the complainant as to the nature or purpose of the act; and where the accused secures consent by impersonating someone known to the complainant.³⁶⁹ Consent is defined in s 74 of the Act in the following terms:

For the purposes of this Part, a person consents if he agrees by choice, and has the freedom and capacity to make that choice.³⁷⁰

3.3.3.1 Criticisms

The consent provisions in the SOA have been criticised on a number of fronts. First, it has been argued that the definition in s 74 lacks sufficient clarity and in practice is likely to be interpreted in accordance with stereotypical juror assumptions about sexual assault.³⁷¹ Second, whereas the circumstances in s 75 are to be regarded merely as *evidence* of absence of consent critics contend that they should properly be regarded as

³⁶⁸ *Crimes Act 1900* (NSW) ss 61HA(4), (6).

³⁶⁹ In some situations these presumptions assume distinctly paternalistic overtones. The former envisages a victim who is so simple or naive as to be unable to understand the sexual nature of the act. This is only likely to be true in cases where a victim is suffering from cognitive impairment to a degree or has received no sexual education. The latter smacks of the mediaeval conception of rape as a property offence, at least where the victim mistakenly believes the offender is her husband. In this scenario the offender is appropriating property rights that were traditionally reserved to the victim's spouse.

³⁷⁰ *Sexual Offences Act 2003* (UK) s 74.

³⁷¹ See Jennifer Temkin and Andrew Ashworth, 'The *Sexual Offences Act 2003*: Rape, Sexual Assault and the Problems of Consent' (2004) *Criminal Law Review* 328, 336; Victor Tadros, 'Rape Without Consent' (2006) 26(3) *Oxford Journal of Legal Studies* 515, 520 ff.

constituting non-consensual sex *in fact*.³⁷² Third, Temkin and Ashworth note the pitfalls of exhaustively enumerating the presumptions, suggesting that particular circumstances that should rightly have been included are absent. Although the Home Office consultation document which formed the basis for much of the SOA considered that the list would be refined over time by the courts³⁷³ the legislation in its final form precludes the common law development of further presumptions against consent.³⁷⁴ Finally, there has been criticism of the overall structure of the sexual assault provisions and how the alternative approaches to establishing absence of consent were intended to interact.

Definitional Problems

Where the facts of a particular case do not provide a basis for the enlivening of the presumptions in ss 75 and 76 the jury must rely on the definition of consent in s 74 in determining the existence of consent. Commentators have criticised s 74, principally on the grounds that it is ambiguous and that it still leaves the notion of consent open to manipulation by defence counsel. For example, it is by no means clear that defining consent in terms of agreement leads to a clarification of the concept. There is just as much ambiguity about the meaning of agreement as there is about the meaning of consent. The legislation sets few limits on the range of subjective states that jurors may legitimately interpret as agreement in the legal context, beyond the extremes of violence and incapacity. In the absence of a positive communication standard, there is no indication whether only evidence that the agreement was articulated in some way will raise a reasonable doubt about absence of consent or whether it is sufficient to argue a ‘meeting of minds’.³⁷⁵ If it is the latter, then prejudicial rape stereotypes may still operate in the process of interpreting whether or not the complainant’s words or actions are indicative of consent. Moreover, the requirement that the agreement be ‘by choice’ generates its own definitional problems. Can the complainant be said to have agreed by choice when the only alternative is to be beaten by her assailant, or must the choice be free and voluntary? Without guidance about the quality of the choice there are no guarantees that the definition in s 74 will promote the right to sexual autonomy.

The task for the jury is further complicated because they must also consider whether the complainant had the freedom and capacity to make that choice. These terms are ‘heavily contested in meaning’.³⁷⁶ Freedom and capacity are relative concepts, and all

³⁷² Tadros, above n 96, 523.

³⁷³ Home Office (UK), *Setting the Boundaries: Reforming the Law on Sexual Offences: Volume 1* (2000) [2.10.7].

³⁷⁴ Temkin and Ashworth, above n 96, 338.

³⁷⁵ Tadros, above n 96, 521.

³⁷⁶ Ibid 522.

choices can be regarded as fettered in some way. Critically though, the jury must be informed about where the boundaries of freedom to consent are drawn beyond which, at least in the legal context, the complainant's freedom or capacity is unacceptably constrained. The Home Office Report recommended that the legislation include a standard jury direction on consent, which could challenge erroneous and discriminatory juror assumptions³⁷⁷ but ultimately this recommendation was not adopted. Instead, it has been left to the Judicial Studies Board to formulate such a direction. The Home Office report observed that a direction enshrined in legislation offered greater opportunity for debate as to its eventual form and greater opportunity for exposure to a wide public audience.³⁷⁸ Several commentators have also questioned the wisdom of leaving 'a pivotal element of the reform strategy – a new autonomy-based approach to determining consent ... in the hands of the Judicial Studies Board'.³⁷⁹ In contrast, the Victorian *Crimes Act 1958* includes mandatory jury directions on consent in s 37AAA and supplements these with a statement of objectives and guiding principles in ss 37A and 37B, which denote personal autonomy as the signifier of valid consent. Arguably the UK parliament missed an opportunity to do the same. Admittedly, it may be that it was looking over its shoulder to the Strasbourg Court, wary of providing too much statutory guidance on matters of fact in case it raised fair trial issues. Effective removal of issues from the trier of fact, by way of mandatory jury directions, might contravene the *Human Rights Act 1998* (UK) and the right to a fair trial guaranteed under article 6 of the *European Convention on Human Rights*³⁸⁰ in the same way that the restrictions on sexual history evidence imposed by the *Youth Justice and Criminal Evidence Act 1999* (UK) were initially found to be incompatible with article 6.³⁸¹ Victoria also has a human rights instrument, the *Charter of Human Rights and Responsibilities 2006* (Vic). When the Crimes Amendment (Rape) Bill which inserted s 37AAA was introduced the Attorney-General declared that the bill was compatible with the Charter.³⁸² An inference that might be drawn from Victoria's implementation of mandatory jury directions on consent is that the principle of the protection of a complainant's personal autonomy was thought to outweigh any potential infringement of an accused's fair trial rights. It may, however, have simply been the case that there was a lack of awareness of human rights

³⁷⁷ Home Office, above n 98 [2.11].

³⁷⁸ Ibid.

³⁷⁹ Temkin and Ashworth, above n 96, 336.

³⁸⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³⁸¹ See *R v A* [2001] 3 All ER 1 [46]. Gans notes that the House of Lords has, to a degree, since retreated from its approach in *R v A*: Jeremy Gans, 'Evidence Law under Victoria's Charter: Rights and Goals – Part 1' (2008) 19(3) *Public Law Review* 197, 214.

³⁸² Victoria, *Parliamentary Debates*, Legislative Assembly, 22 August 2007, 2858 (Rob Hulls, Attorney-General).

implications, a symptom of the generally weaker recognition of formal human rights protections in Australia.³⁸³

Evidence of Non-Consent

The second major criticism of the legislation concerns the presumptions contained in ss 75 and 76. Section 75 consists of evidential presumptions in relation to consent. The effect of these presumptions is that where one of the circumstances outlined in ss (2)(a)–(f) is proved beyond reasonable doubt, the complainant is taken not to have consented unless the defendant can adduce sufficient evidence to raise a doubt about consent or reasonable belief in consent. The presumptions are intended to refine the definition of consent and narrow the jury's focus in their deliberations on consent by describing situations where they may conclude that the complainant was not consenting. Since these presumptions are only evidential and not conclusive it follows that the circumstances in s 75 do not in themselves constitute absence of consent. Therefore, it is open to the jury to conclude that the circumstances may be compatible with consent.³⁸⁴ As Tadros points out, the section confuses evidence of absence of consent with absence of consent as a subjective state of mind. At least some of the circumstances in s 75 in fact constitute a lack of consent as defined in s 74.³⁸⁵ For example, s 75(2)(a) provides that the use or threat of violence against the complainant is evidence of absence of consent, that is, the jury is permitted to interpret evidence of violence as evidence that the complainant did not agree by choice. However, whereas expressions of fear or distress might amount to *evidence* that the complainant's freedom to choose had been compromised, the use or threat of violence should amount *in fact* to a lack of freedom, it is not merely evidence of that lack.³⁸⁶ The result is that the defence will be entitled to raise evidence to enliven the issue of consent even in relation to situations that should instead be conclusive of absence of consent.

A further criticism relates to s 75(1)(c), which provides that an evidentiary presumption of absence of consent will not arise unless the defendant is aware of the existence of any of the circumstances enumerated in ss (2).³⁸⁷ Although, in relation to

³⁸³ Only two Australian jurisdictions, Victoria and the Australian Capital Territory, have introduced comprehensive human rights legislation: *Charter of Human Rights and Responsibilities 2006* (Vic); *Human Rights Act 2004* (ACT). Australia does not have a national bill of rights and the role and source of human rights principles in the criminal law context is accordingly somewhat uncertain. For a comprehensive coverage of the human rights landscape in Australia see Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) ch 2.

³⁸⁴ Tadros, above n 96, 525.

³⁸⁵ Ibid.

³⁸⁶ Ibid 523.

³⁸⁷ *Sexual Offences Act 2003* (UK) s 75(1)(c).

those sexual offences to which the presumptions apply,³⁸⁸ the accused's awareness will be relevant to establishing the mental ingredient of an absence of a reasonable belief in consent, it cannot logically affect the external ingredient of absence of consent, which is the subject of the evidentiary presumptions. If, for example, the complainant is suffering from a physical disability that prevents her from communicating her consent then prima facie she is not consenting. The fact that the accused is unaware of her disability in no way affects her subjective state of mind. It seems unprincipled that the question of the defendant's awareness should determine the question of whether he is charged with an evidentiary onus when his awareness can have no bearing at all upon the existence or otherwise of that element to which the onus relates, i.e., the absence of consent.

If the defendant hopes to rebut the presumption in s 75 he bears an evidentiary onus in relation to adducing evidence of consent or evidence which will sustain a reasonable belief in consent. The section requires that the evidence be sufficient to raise the issue. Once again the lack of definitional clarity creates problems for the implementation of this provision. How is the court to determine what amounts to evidence of consent when the concept of consent itself is ambiguous?³⁸⁹ How much evidence will be sufficient to raise an issue? If the threshold is set too low then in effect s 75 becomes redundant. The evidential presumptions are rendered impotent if any evidence at all will rebut them. On the other hand if the threshold is set too high, this has implications for the presumption of innocence in the sense that the accused may in effect be required to provide conclusive evidence of consent.³⁹⁰

Ultimately, though, it may be that the burden is likely to be easily discharged, particularly in view of the fact that UK legislation is interpreted in light of the provisions of the *European Convention on Human Rights*.³⁹¹ Specifically, article 6(2) confirms the presumption of innocence in criminal trials. Once the evidentiary onus is satisfied, the onus of proof reverts to the prosecution who must prove beyond reasonable doubt that there was no consent. Thus it may be that it will require scant evidence before the complainant is once again required to defend her behaviour and character before a sceptical jury primed with all the prejudices that the SOA was intended to combat.³⁹²

³⁸⁸ Ibid s 1 (rape), s 2 (assault by penetration), s 3 (sexual assault), s 4 (causing a person to engage in sexual activity without consent).

³⁸⁹ Tadros, above n 96, 531.

³⁹⁰ Ibid 530–31.

³⁹¹ *Convention for the Protection of Fundamental Rights and Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

³⁹² In fact, McEwan argues that the combined effect of the European Convention, the presumptions in s 75 and the sexual history provisions in s 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) will expose complainants to more, not less, intrusive cross-examination: Jenny McEwan, 'Proving Consent in Sexual Cases: Legislative Change and Cultural Evolution' (2005) 9 *International Journal of Evidence and Proof* 1, 19–20.

Based on the tenor of directions contained in the Crown Court Bench Book this would seem to be a realistic assumption. A footnote to the suggested directions on consent, capacity and voluntary intoxication reads: ‘See also the evidential presumptions about consent in sections 75 and 76 Sexual Offences Act 2003 *which in practice seldom apply*’ (emphasis added).³⁹³

An Exhaustive List

Unlike other jurisdictions, which have adopted a category approach to non-consent,³⁹⁴ the lists of vitiating circumstances in the SOA are exhaustive. The original recommendation in the Home Office Report was that the legislation should enumerate those situations where consent was most clearly absent, leaving it to the courts to develop further circumstances on a case by case basis. Instead, Parliament adopted an exhaustive list that prevents development of further categories through the common law. If additional categories are to be added this must now be done by legislation.³⁹⁵ This would be less problematic if the original list was comprehensive. However, ss 75 and 76 are markedly deficient in several respects.

First, the legislation contains a presumption only in relation to threats of violence. There is no acknowledgement that other species of threat, such as threats to one’s livelihood or threats of public humiliation for example, may be just as effective in inducing consent as threats of physical violence. Moreover, the legislation introduces a novel requirement that the threats be of immediate violence. The previous law included no such restriction. Presumably the drafters considered that a threat of future violence either against the victim or, more logically, against a third party such as her children, would not have sufficient substance to vitiate consent since the victim could seek help in the interim. Such a view fails to take into account the very real force of such threats in particular contexts. As Baroness Noakes stated in debate on the Sexual Offences Bill:

If threats are made of future harm, whether to the victim, to a child or to another relative or friend, those threats can carry an absolute conviction, very powerfully, to the person who is being attacked. That person, if he or she is in an abusive

³⁹³ Crown Court Bench Book, ‘Chapter 17: The Trial of Sexual Offences’ (Judicial Studies Board, 2010) n 655.

³⁹⁴ *Crimes Act 1900* (NSW) ss 61HA(4)–(6); *Crimes Act 1958* (Vic) ss 36(a)–(g); *Criminal Code* (Tas) ss 2A(2)(a)–(i); *Criminal Code*, RSC 1985, c C-46, s 273.1(2).

³⁹⁵ Again, this conservative approach may be explained by Parliament’s sensitivity to the risk that the European Court of Human Rights in Strasbourg might find that the conclusive presumptions as they affect the allocation of the onus of proof infringed fair trial principles. Section 2 of the *Human Rights Act 1998* (UK) requires national courts to take account of the decisions of the Strasbourg Court.

relationship, may feel completely powerless to resist. It is just as real as any other form of threat.³⁹⁶

The requirement that the threat be an immediate and violent threat can be contrasted with the Tasmanian provision, which is cast in very broad terms. Consent under s 2A of the Tasmanian Criminal Code is vitiated where it is procured by a threat of any kind.³⁹⁷ This correctly redirects the enquiry away from a consideration of the objective seriousness or immediacy of the threat, to the single, relevant question, whether the threat in fact procured consent.

Second, cases involving voluntarily intoxicated complainants are excluded from the operation of the evidential presumptions in the SOA. Section 75(2)(f) provides that a person does not agree by choice where a stupefying substance has been administered to them. Since voluntarily intoxicated complainants are excluded from the reach of the provision the implication is that women who consume alcohol are to some degree responsible for their victimisation and accordingly undeserving of the law's protection. Third, the wording of the section potentially jeopardises the fundamental principle of fairness to the accused. The section requires only that the substance administered 'was capable of causing or enabling the complainant to be stupefied or overpowered'³⁹⁸ and not that in fact it had that effect. Theoretically, therefore, a defendant could be convicted of rape on the basis that he spiked the victim's drink irrespective of the fact that the substance had no effect on her capacity to consent.

Structure of the Provisions

A final criticism levelled at the SOA relates to the structure of the consent provisions as a whole. It is clear that the definition, the evidential presumptions and the conclusive presumptions are linked but, if the sections are intended to interact in an hierarchical way (which seems likely), the basis on which they have been ordered is less evident. There is no clear indication whether the most reprehensible conduct attracts a conclusive presumption or simply conduct that is most obviously incompatible with consent.³⁹⁹ However, the way that the provisions are juxtaposed invites the conclusion that procuring consent by an intentional deception as to the nature of the act,⁴⁰⁰ a circumstance which generates a conclusive presumption in relation to absence of consent, is more

³⁹⁶ United Kingdom, *Hansard*, House of Lords, 19 May 2003, vol 648, col 597 (Baroness Noakes).

³⁹⁷ *Criminal Code* (Tas) s 2A(2)(c).

³⁹⁸ *Sexual Offences Act 2003* (UK) s 75(2)(f).

³⁹⁹ Temkin and Ashworth, above n 96, 336–7.

⁴⁰⁰ *Sexual Offences Act 2003* (UK) s 76(2)(a).

reprehensible than using violence to procure consent.⁴⁰¹ Such a conclusion may be quite valid based on a particular factual scenario but it will not necessarily be warranted in all cases.

3.3.3.2 Summary of the *Sexual Offences Act 2003*

In the second reading speech on the Sexual Offences Bill 2003 Lord Falconer observed that the existing law on sexual offences was ‘archaic, incoherent and discriminatory’,⁴⁰² and that it failed to reflect ‘changes in society and social attitudes’.⁴⁰³ Given the identified shortcomings of the current law it seems that the same observations may still be made. Some of the problems are the result of poor drafting, but more fundamentally the legislation fails to establish the contours of the legal notion of consent. Arguably, initiatives such as the Victorian practice of giving juries a statement of guiding principles to assist in the interpretation of the definition of consent more effectively restrict the jury’s deliberations to a consideration of consent only in its legal context.

3.3.4 Canada —*Criminal Code*

In 1983 the Canadian legislature replaced the crime of rape with a series of sexual assault provisions that emphasised the violence of the offence. The raft of reforms also abolished spousal immunity from prosecution for rape, imposed restrictions on cross-examination on the complainant’s sexual history and repealed the law in relation to corroboration of the complainant’s testimony and the doctrine of recent complaint. These rape shield provisions eventually fell foul of the recently instituted *Canadian Charter of Fundamental Rights and Freedoms*.⁴⁰⁴ In the Supreme Court of Canada case of *Seaboyer*⁴⁰⁵ the restrictions on sexual history evidence were struck down as a violation of the defendant’s right to full answer and defence guaranteed under ss 7 and 11(d) of the Charter. In response to the decision in *Seaboyer* the Minister of Justice, the Hon Kim Campbell, convened a gathering of women’s groups from across Canada. This coalition eventually drafted Bill C-49, re-writing some of the offending provisions identified in *Seaboyer*.⁴⁰⁶ The Bill went further though than merely redrafting the rape shield laws. It

⁴⁰¹ Ibid s 75(2)(a).

⁴⁰² United Kingdom, *Hansard*, House of Lords, 13 February 2003, vol 644, col 771 (Lord Falconer).

⁴⁰³ Ibid.

⁴⁰⁴ *Canada Act 1982* (UK) c 11, sch B pt 1 (‘*Canadian Charter of Fundamental Rights and Freedoms*’).

⁴⁰⁵ *R v Seaboyer* [1991] 2 SCR 577.

⁴⁰⁶ The Canadian government might instead have simply invoked the over-ride provision in s 33 of the Charter. That they chose not to do so is perhaps not surprising given that the so-called ‘notwithstanding clause’ is very rarely invoked. Leeson offers various explanations for this,

was also designed ‘to amend the substantive law of sexual assault to define consent and non-consent so as to narrow the range of “evidence” capable of being relevant to the determination of guilt or innocence’.⁴⁰⁷ In other words, the amendments were intended to address the problem, now familiar in the context of this thesis, of prejudicial thinking in jury decision making in rape trials.

The Criminal Code now contains a legislative definition of consent which applies to sexual assaults in s 273.1(1), ‘the voluntary agreement of the complainant to engage in the sexual activity in question’, coupled with a list of circumstances where no consent is obtained, in s 273.1 (2). These circumstances are supplemented by vitiating circumstances in s 265(3) which apply to assaults generally. This is the same approach apparent in the treatment of the issue of consent in the Victorian, Tasmanian and New South Wales legislative regimes. All these statutes have adopted a legislative definition of consent and the definition itself is in similar terms.⁴⁰⁸ All include a non-exhaustive list of circumstances, which vitiate consent.⁴⁰⁹ There are minor differences in the structure of the provisions but arguably these differences do not affect the substantive operation of the provisions. The Canadian approach separates the vitiating circumstances into those which apply to assaults generally and those which specifically apply to sexual assaults. In addition, circumstances in which an ostensible consent will not exculpate the accused are enumerated in s 265(3) and circumstances where legally consent does not exist are addressed separately in s 273.1(2). In Tasmania, Victoria and New South Wales vitiating circumstances are dealt with in one general provision. The real difference is that, whereas the Victorian and Tasmanian jurisdictions have unambiguously emphasised the importance of communicated consent and the implications of the complainant’s failure to manifest consent,⁴¹⁰ the Canadian provisions do not directly address the effect of passivity on determinations relating to absence of consent. At best, s 265(3) provides that there is no consent if submission or lack of resistance is induced by force, threats of force or abuse of a position of authority. It is suggested that this has contributed to the

including the risk that such a move might be very unpopular politically. See Howard Leeson, ‘Section 33, the Notwithstanding Clause: A Paper Tiger?’ (2000) 6(4) *Choices* 1. See also Lise Gotell, *Feminism, Equality Rights and the Charter of Rights and Freedoms in English Canada, 1980–1992* (PhD Thesis, York University, 1993).

⁴⁰⁷ S McIntyre, ‘Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law’ (2000) 20 *Canadian Woman Studies* 72, 76.

⁴⁰⁸ Victoria and Tasmania use the phrase, ‘free agreement’ (*Crimes Act 1958* (Vic) s 36; *Criminal Code* (Tas) s 2A(1)). New South Wales expresses the concept in terms of free and voluntary agreement (*Crimes Act 1900* (NSW) s 61HA(2)). The Canadian version speaks of ‘voluntary agreement’ (*Criminal Code*, RSC 1985, c C-46, s 273.1(1)).

⁴⁰⁹ It is noted here that, whereas the *Sexual Offences Act 2003* (UK) also includes a definition of consent and vitiating circumstances, its effectiveness has been compromised by the inclusion inter alia of an exhaustive, rather than a non-exhaustive list of vitiating circumstances.

⁴¹⁰ See *Crimes Act 1958* (Vic) s 37AAA(d); *Criminal Code* (Tas) s 2A(2)(a).

inconsistency with which the legislation has been interpreted in subsequent Canadian cases. In the absence of an unambiguous requirement of communicated consent some courts have accepted that inferences may be drawn from the complainant's behaviour sufficient to create a reasonable doubt about absence of consent. In this way, the assumptions about rape and genuine rape victims that Bill C-49 sought to eradicate from the rape trial have been reinvested with legitimacy.

The Supreme Court decision in *R v Ewanchuk*⁴¹¹ is the leading authority on the interpretation of s 273.1 of the Criminal Code. This decision was originally hailed as judicial confirmation that in sexual encounters, no means no.⁴¹² More recent commentators have suggested that in fact the majority judgment goes further than this. It is claimed that, correctly understood, the decision 'more accurately stands for the proposition that 'only yes means yes'.'⁴¹³ The effect of this distinction is more than merely semantic. A consent standard that falls short of a requirement of explicit communicated agreement, that is, no means no, does not bar a finding by the trier of fact that a failure to manifest dissent may amount to implied consent. However, the majority in *Ewanchuk* rejected a defence of implied consent insisting:

the trier of fact may only come to one of two conclusions: the complainant either consented or not. ... If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established.⁴¹⁴

The majority view thus supports a communicative model of consent, that is, 'only yes means yes.' Cases post-*Ewanchuk* seem to confirm the Supreme Court's interpretation of the consent provisions. Gotell, for example, states that subsequent judicial decisions have embraced a positive consent standard.⁴¹⁵ In some cases the more exacting requirement of informed consent has been applied. In *R v RR*,⁴¹⁶ an appellate decision from Ontario, Abella JA approved the comments of Thompson J at first instance in relation to the concept of consent. Thompson J stated:

It is not sufficient to simply determine whether an individual said yes when asked if they would submit to or engage in a particular activity. It must be determined

⁴¹¹ [1999] 1 SCR 330.

⁴¹² See, eg, Don Stuart, 'Sexual Assault: Substantive Issues Before and After Bill C-49' (1993) 35 *Criminal Law Quarterly* 241.

⁴¹³ Rakhi Ruparelia, 'Does No "No" Mean Reasonable Doubt?' (2006) 25 *Canadian Woman Studies* 167, 167. See also Lise Gotell, 'Rethinking Affirmative Consent in Canadian Law: Neoliberal Sexual Subjects and Risky Women' (2008) 41 *Akron Law Review* 865.

⁴¹⁴ *R v Ewanchuk* [1999] 1 SCR 330 [31].

⁴¹⁵ Lise Gotell, 'The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance and Neo-Liberal Sexual Citizenship' in Susan B Boyd, Dorothy E Chunn and Hester Lessard (eds), *Reaction and Resistance: Feminism, Law and Social Change* (UBC Press, 2007) 127, 147.

⁴¹⁶ [2001] OJ No. 4254 (CA) (QL).

whether that individual made such a decision of their own free will, fully aware of or apprised of the proposed activity and its consequences.⁴¹⁷

It now appears that courts are willing to increase the scope of behaviours that fall within the ambit of prohibited sexual conduct. No longer is the credible assault scenario likely to be restricted to incidents of stranger rape, and no longer is the credible complainant necessarily one who is sober, modest and virtuous.⁴¹⁸ L'Heureux- Dubé J's concurring judgement in *Ewanchuk*, in which she explicitly rejected reliance on classic stereotypes of rape, has been approved in several more recent cases.⁴¹⁹ Commenting on statements of McClung JA in the Court of Appeal in which he noted that the complainant 'did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines',⁴²⁰ L'Heureux- Dubé J declared, '[t]hese comments ... help reinforce the myth that under such circumstances, either the complainant is less worthy of belief, she invited the sexual assault, or her sexual experience signals probable consent to further sexual activity.'⁴²¹

It would be premature, however, to declare victory in the struggle against the unwarranted influence of stereotypes and prejudices in rape cases. *Ewanchuk* continues to be misapplied and rape stereotypes continue to influence courts' findings in relation to consent.⁴²² In addition Gotell argues that, even if the complainant's character and demeanour are no longer routinely exploited as evidence of consent the practice of victim blaming continues and it is only the nature of the impugned conduct that has changed. Now it is the complainant who fails to take responsibility for her own safety or who does not engage in effective risk management who invites censure, rather than the woman who is of dubious moral character.⁴²³ Despite this, Gotell suggests that the legislative reforms and the decision in *Ewanchuk* have brought about a genuine shift in the focus of the court's analysis. Since reasonable doubt about the ingredient of absence of consent requires evidence of clear, express agreement, where such evidence is lacking, consent may no longer be inferred from the complainant's equivocal actions or from her passivity. The only behaviour that may relevantly be the subject of the court's scrutiny is that of the accused as it examines the evidence relating to the steps he took to establish the existence of consent.⁴²⁴ This is a shift that has been occasioned by the amendments to s 273.1. The definition of consent in s 273.1(1) suggests that absence of consent as an external element of the offence is to be determined from the subjective perspective of the

⁴¹⁷ Cited in *R v RR* [2001] OJ No. 4254 (CA) (QL) [44].

⁴¹⁸ Gotell, above n 140, 146.

⁴¹⁹ See Ruparelia, above n 138, 170–1.

⁴²⁰ *R v Ewanchuk* [1999] 1 SCR 330 [88].

⁴²¹ *Ibid* [89].

⁴²² Ruparelia, above n 138.

⁴²³ Gotell, above n 140, 151.

⁴²⁴ *Ibid* 147.

complainant.⁴²⁵ Together, ss 153.1(3) and 273.1(2) impose limits on the type of evidence that will be relevant and admissible in establishing consent. For example, prima facie an expression of lack of agreement to the proposed sexual act must now be accepted as conclusive evidence of absence of consent.⁴²⁶ The complainant's objective behaviour can no longer be used against her to defeat the presumption of absence of consent entailed by ss 153.1(3) and 273.1(2). Instead, once absence of consent is made out on the basis of the existence of a vitiating circumstance, the evidentiary onus shifts to the accused to explain the steps he took in arriving at a belief that the acts were consensual.

The reasonable steps enquiry is important in establishing the mens rea of the offence where the Crown is required to prove a fault element, and in establishing whether a claim of mistaken belief in consent should exculpate the accused. The question of the way that the accused's subjective state of mind relates to culpability represents the last major area of rape law that has been the target for reformers. The final section of this chapter presents a comparative evaluation of reform efforts that have relied upon amending the law in relation to knowledge of absence of consent and mistaken belief in consent.

3.4 The Mental Element and Mistaken Belief in Consent

Reforms that focus on the accused's awareness have tended to concede an aspect of objectivity in the formulation of the mental element of sexual offences and in the defence of mistaken belief in consent. In those jurisdictions where a fault element is prescribed, the relevant subjective mental state for rape, for example, is knowledge of absence of consent. At common law the requisite knowledge can generally be established by proving either that the accused in fact knew that the other party was not consenting or that the accused was reckless as to whether the other person was consenting. Recklessness consists of either advertence to the possibility that the other person is not consenting or a complete failure to turn one's mind to the question of consent. Successful denial of the fault element requires that the accused held an honest belief in consent but does not require that that belief be objectively reasonable.⁴²⁷ A wholly subjective assessment of the accused's awareness has been criticised on the grounds that it places responsibility on the complainant to manifest positive dissent and permits prejudicial beliefs about women's sexual behaviour to be exculpatory in the context of very serious criminal offences and voluntary conduct that has had a traumatic impact on another individual.

⁴²⁵ This interpretation was affirmed in *Ewanchuk*. See *R v Ewanchuk* [1999] 1 SCR 330 [31].

⁴²⁶ *Criminal Code*, RSC 1985, c C-46, s 153.1(3)(d).

⁴²⁷ *DPP v Morgan* [1976] AC 182. The approach in *Morgan* was confirmed as the correct approach by the NSW Court of Criminal Appeal in *R v Banditt* [2004] NSWCCA 208.

Accordingly, there have been proposals put forward that a modified standard should be adopted.⁴²⁸

In those jurisdictions where no mental element is prescribed, reformers have targeted the way the test for the defence of mistaken belief in consent has been formulated. A mistaken belief that the complainant was consenting is generally exculpatory in relation to adult sexual offences. In the code jurisdictions in Australia⁴²⁹ and in New South Wales as a result of the 2007 amendments, the belief in consent must be both honest and reasonable as distinct from the orthodox common law position, which only requires that the belief be honestly held. The common law stance is a consequence of the fact that, at common law an honestly held belief in consent negates the wholly subjective mental element of knowledge of absence of consent. In the code jurisdictions the mental element for rape is limited to an intention to penetrate so a mistaken belief in consent does not constitute a denial of the mental ingredient, but instead is offered as a defensive excuse for otherwise blameworthy conduct. Thus, the orthodox common law approach is to apply a subjective test to the determination of the question of mistake and the code approach is to impose a mixed test which includes an evaluation of objective reasonableness. There is an evident tension between these two approaches and arguments have been advanced in favour of both.⁴³⁰ On the one hand, a subjective analysis of mistaken belief accords with general legal principles and the presumption of mens rea, or guilty mind,⁴³¹ the strength of which was confirmed in the Australian High Court case of *He Kaw Teh*.⁴³² On the other hand, an objective approach precludes the defendant from enlisting as support for his mistaken belief the discriminatory stereotypes about female sexual behaviour that modern reform efforts have sought to expunge. An examination of the way that the various sexual offences provisions are constituted reveals, however, that in fact there is not a stark dichotomy between the two approaches and that both the objective and subjective tests have been modified to some degree.

The defence of mistake of fact is provided for in s 14 of the Tasmanian Criminal Code. The availability of the defence, in relation to rape and other sexual offences was

⁴²⁸ See generally, Victorian Law Reform Commission, above n 61, Ch 8.

⁴²⁹ The Code jurisdictions are the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia. The Commonwealth is also a Code jurisdiction although its jurisdiction in criminal matters is limited.

⁴³⁰ For a useful summary of the competing points of view see Australian Law Reform Commission, *Family Violence- Improving Legal Frameworks*, ALRC CP 1 (2010) 750 –2.

⁴³¹ There is a fundamental presumption at common law that in the absence of an explicit mental element in statutory offences there is a requirement to prove, as an essential element of the offence, that the accused's criminal act was accompanied by a guilty mind. This presumption may be displaced by the words of the statute or by the subject matter of the offence.

⁴³² (1985) 157 CLR 523.

confirmed in *Snow's Case*.⁴³³ The rules governing the application of the defence in relation to mistakes about consent in the context of sexual offences are found in s 14A, which was inserted as part of the reforms in 2004. The belief must be in consent as defined in s 2A, that is, consent which amounts to free agreement, and the mistake must be one that is both honest and reasonable. The other code jurisdictions also require that the mistaken belief satisfies the test of reasonableness.⁴³⁴ The test has not, however, been interpreted as a wholly objective one, and in several cases a hybrid test has been upheld which considers whether the belief was reasonable taking into account the particular circumstances of the accused. Murray J in the case of *BRK v The Queen*⁴³⁵ endorsed the trial judge's direction that, 'the question of reasonableness was "to be judged by the standard of a reasonable person of the same age, background and level of intellectual functioning as the accused"'.⁴³⁶ This approach was also approved in *Aubertin v State of WA*⁴³⁷ with McClure JA stating:

The requirement that the belief be reasonable imports an objective standard. The subjective aspect is that the reasonableness is to be judged by reference to the personal attributes and characteristics of the accused that are capable of affecting his or her appreciation or perception of the circumstances in which he or she found himself or herself. However, the ambit of what constitutes the personal attributes and circumstances of a particular accused has not to my knowledge been identified or exhaustively enumerated. It covers matters over which an accused has no control such as age (maturity), gender, ethnicity, as well as physical, intellectual and other disabilities. This list does not purport to be exhaustive.⁴³⁸

Establishing the scope of the 'personal attributes and characteristics' which are relevant is critically important, since the objective test will be of no practical effect if any beliefs and attitudes, no matter how unreasonable, are permitted to influence the assessment of reasonableness. Recognising that not all personal attributes will be relevant, in *Aubertin* McClure JA added:

Further, a person's values, whether they be informed by cultural, religious or other influences, are not part of a person's characteristics or attributes for the purpose of assessing the reasonableness of an accused's belief. For example, values resulting in extreme views as to the appropriate mode of dress for women, from which inferences about consent are purportedly drawn, cannot positively affect or inform the reasonableness of an accused's belief. Values do not impact on the capacity to perceive or appreciate primary objective facts or the capacity to process that information. In any event, reasonableness must be judged in the light of generally accepted community standards and attitudes.⁴³⁹

⁴³³ [1962] Tas SR 271.

⁴³⁴ *Criminal Code* (NT) s 32; *Criminal Code* (Qld) s 24; *Criminal Code* (WA) s 24.

⁴³⁵ [2001] WASCA 161 (Unreported, Murray, Parker and Owen JJ, 25 May 2001).

⁴³⁶ *Ibid* [36].

⁴³⁷ [2006] WASCA 229.

⁴³⁸ *Ibid* [43].

⁴³⁹ [2006] WASCA 229 [46]. See also *R v Mrzljak* [2004] QCA 420 and, in the context of self-defence, *R v McCullough* [1982] Tas R 43.

At common law, the offence of rape incorporates the mental element of knowledge that the complainant is not consenting or at least recklessness in this regard. The leading common law decision in relation to mistake comes from the House of Lords case of *Morgan*.⁴⁴⁰ This case established that an honestly held belief in consent, no matter how objectively unreasonable, will negate the mental element of knowledge of absence of consent. Whilst this decision accords with orthodox legal doctrine on mens rea it has attracted strong criticism, particularly from feminist advocates of rape reform.⁴⁴¹ It is at odds with the direction of modern law reform initiatives in that it credits justifications for belief in consent even where that belief is grounded in the very stereotypes that the adoption of a communicative standard of consent is intended to counteract. Though different paths have been taken to address this concern, most common law jurisdictions have now moved away from an unmodified subjective standard of reasonableness.

3.4.1 Victoria

In Victoria the assessment of the defendant's knowledge about consent no longer incorporates a wholly subjective test. As a result of the new s 37AA⁴⁴² in an appropriate case the jury is to be directed that they must consider whether the belief was reasonable in all the relevant circumstances. Since knowledge of absence of consent or recklessness as to the existence of consent is an ingredient of the offence of rape, it remains the case that an honest belief in consent will be sufficient to exculpate the defendant, but the mandatory jury directions in s 37AA bring objective considerations to the task of assessing whether the Crown has disproved such knowledge or recklessness beyond reasonable doubt. Thus far, this does not necessarily represent a rejection of the common law position expressed in *Morgan*. As that case recognised, the jury's assessment of whether the belief was in fact held by the accused will be influenced by the objective reasonableness of that belief.⁴⁴³ The more unreasonable the belief, the less likely it is that the jury will accept that accused honestly held it. Where the Victorian provisions part company with *Morgan* is that they set out in s 37AA(b), those factors which are relevant to a determination of the reasonableness of the belief. These are: whether the accused was aware that one of the vitiating circumstances in s 36 existed; whether the accused took steps to ascertain whether the complainant was consenting or not;⁴⁴⁴ and

⁴⁴⁰ [1976] AC 182.

⁴⁴¹ Temkin, above n 47, 119.

⁴⁴² Inserted by *Crimes Amendment (Rape) Act 2007* (Vic) item 5.

⁴⁴³ *DPP v Morgan* [1976] AC 182, 237 (Lord Fraser).

⁴⁴⁴ In South Australia consideration of whether steps were taken to ascertain consent is relevant to the question of reckless indifference. The mental element for rape in that jurisdiction is satisfied by establishing that the accused was recklessly indifferent to the fact that the other person was

any other relevant matters.⁴⁴⁵ The embodiment of a communicative standard of consent represented by the direction that the jury must consider whether any steps were taken to ascertain consent is welcome. It suggests that reasonable doubt about knowledge of absence of consent may require evidence that the accused sought positive indications of consent. The requirement that the jury also consider any other relevant matters is more problematic. Given that the purpose of the directions is to assist the jury in determining whether the Crown has made out all the elements of the offence then they should be interpreted in accordance with the legislation. Therefore the jury directions on consent in s 37AAA together with the statements of objectives and guiding principles in ss 37A and 37B may restrict what will amount to ‘other relevant matters’ for the purposes of s 37AA(b)(iii). However, as it is expressed, it seems a curiously all-encompassing provision and if it is interpreted broadly it allows the jury to consider the peculiar characteristics of the defendant that might reasonably explain why he embraces objectively misogynistic attitudes and beliefs. It also permits scrutiny of the complainant to determine whether, viewed through the distorting lens of those culturally engendered beliefs, her behaviour has induced a belief in consent.⁴⁴⁶

3.4.2 New South Wales

Unlike the Victorian situation the most recent amendments to the New South Wales *Crimes Act 1900* represent a significant departure from the common law as stated in *Morgan* and the previous state of the law in New South Wales. In addition to the subjective test for intention and recklessness,⁴⁴⁷ s 61HA(3) has introduced an objective test for assessing mistaken belief in consent.⁴⁴⁸ The test requires the jury to consider whether the defendant’s belief in consent is supported on reasonable grounds, including

not consenting (*Criminal Law Consolidation Act 1935* (SA) s 48). Arguably, the South Australian legislation prescribes a more squarely objective test in this regard, as it requires, not only that steps were taken to ascertain consent, but also that the steps taken were reasonable if they are to successfully negate the element of reckless indifference.

⁴⁴⁵ *Crimes Act 1958* (Vic) ss 37AA(b)(i)–(iii).

⁴⁴⁶ Temkin and Ashworth argue in relation to the analogous provision in the *Sexual Offences Act 2003* (UK) that it positively invites jurors to scrutinise the complainant’s behaviour in this way. Temkin and Ashworth, above n 96, 342.

⁴⁴⁷ Sections 61HA(3)(a)–(b). The concept of recklessness includes both advertent recklessness (where the accused considers the possibility that the complainant might not be consenting but proceeds to have sex with her anyway) and non-advertent recklessness (where the accused has given no thought at all to whether the complainant is consenting or not). See *R v Kitchener* (1993) 29 NSWLR 696, 697; *R v Tolmie* (1995) 37 NSWLR 660; *R v Milton* [2002] NSWCCA 124. The approach to recklessness is wholly subjective. See *Banditt v The Queen* (2005) 224 CLR 262. In Victoria the question of non-advertent recklessness has been addressed by statute. Section 38(2)(ii) of the *Crimes Act 1958* (Vic) provides inter alia: ‘A person commits rape if he or she intentionally sexually penetrates another person without that person’s consent while not giving any thought to whether the person is not consenting or might not be consenting’.

⁴⁴⁸ *Crimes Act 1900* (NSW) s 61HA(3)(c).

whether steps were taken to ascertain whether the other person consented to sexual intercourse.⁴⁴⁹ An accused can thus no longer rely on a bare assumption of consent as a basis for a claim of honest but mistaken belief in consent. Furthermore, self-induced intoxication is not one of the relevant circumstances to be taken into account. Accordingly, the assessment of whether the grounds for belief in consent are reasonable is approached from the point of view of a reasonable sober person. If an accused's belief is considered not to be objectively reasonable, even if that belief in consent is genuinely held, culpability will be commensurate with an intention to have sex without consent.⁴⁵⁰ It is argued that requiring that the grounds for belief are reasonable is a more objective test than requiring that the belief itself be reasonable. The particular attributes of the accused obviously influence his assessment of the signals that the complainant is sending. A jury may well conclude that although the accused's reading of the situation is objectively unreasonable, his belief in consent is understandable, and exculpatory in the legal context, if it flows logically from the erroneous assumptions he has made. If, however, the enquiry is directed to the reasonableness of the grounds for belief then the accused's personal attributes should be irrelevant. The mere fact that a particular accused has been socialised to the view that women who dress provocatively are necessarily sexually available does not make that viewpoint reasonable grounds for a belief in consent. There may be cause to hope, therefore, that s 61HA(3)(c) will prove more successful in excluding irrelevant subjective considerations from the assessment of the reasonableness of a mistaken belief in consent, and as a consequence undermine the influence of classic rape and gender stereotypes in sexual offences trials.

Section 61HA(3) is a deeming provision and once the jury has determined that no reasonable grounds for the belief exist then the defendant is presumed to know that consent was absent. Compared to the Victorian preference for jury directions it represents a firmer embrace of an objective assessment of mistaken belief. Formulated as it is, and together with its insistence that the jury consider the steps taken to ascertain consent, it is more akin to the mistake provisions in the code jurisdictions and particularly s14A in the Tasmanian Criminal Code. It also more closely approximates an unmodified objective test for mistake. The section does not amount to a total renunciation of the subjective test, however, since the jury is required to consider all the circumstances of the case. It is probable, in the light of earlier authority, that this will include the particular attributes of the accused. Whether the expression 'all the circumstances of the case' is more limiting than the phrase 'any other relevant matters' in s 37AA(iii) of the Victorian *Crimes Act 1958* remains to be seen. It may be that the question of relevancy will be circumscribed

⁴⁴⁹ Ibid s 61HA(3)(d).

⁴⁵⁰ Dobinson and Townsley, above n 82, 166.

by the suggestion of the necessity of a temporal correspondence, absent from the Victorian provision, between the evidence relied upon to support a belief in consent and the transgressive sexual behaviour of the accused.

The amendments to the *Crimes Act 1900* post-date those to the Tasmanian Criminal Code and they are consistent with the philosophy underpinning the Tasmanian reforms, to implement an affirmative model of consent and to place responsibility for establishing that consent exists on both parties in sexual encounters. The New South Wales government has committed to a review of these initiatives after four years⁴⁵¹ so it remains to be seen what the effect of these reforms will be.

3.4.3 United Kingdom

The approach in the United Kingdom has been to introduce a test of reasonableness into the mental element for rape.⁴⁵² The prosecution must now prove that the accused did not hold a reasonable belief in consent. The original Sexual Offences Bill proposed a ‘reasonable person’ standard⁴⁵³ against which the belief in consent was to be measured, but this did not survive the Bill’s progress through Parliament. Instead, a test of what was reasonable in the circumstances, including a consideration of any steps taken to ascertain consent was adopted. Once again this is not a wholly objective standard. Instead, the question is whether the belief is reasonable considered in the light of the circumstances of the case and the relevant characteristics of the accused. That this is so is underlined by the interaction of the mistake defence with the evidential presumptions in s 75. It has been argued above in relation to the structure of the consent provisions in the SOA that, rather than amounting to evidence of consent, the presumptions in s 75 constitute absence of consent in fact. Proof of the existence of a circumstance listed in s 75(2) should bar a claim by the defendant of a mistaken belief in consent. Any such belief would amount to a mistake of law rather than a mistake of fact. And yet s 75(1)(c) permits an accused to adduce evidence to support the defence:

the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.⁴⁵⁴

The same criticisms may therefore be made as those which were raised in relation to both the Victorian *Crimes Act 1958* and the New South Wales *Crimes Act 1900*, that is,

⁴⁵¹ *Crimes Act 1900* (NSW) sch 11, pt 25, s 67.

⁴⁵² *Sexual Offences Act 2003* (UK) s 1(2).

⁴⁵³ *Sexual Offences Bill 2003* [HL] s 1(3). See also the Government’s White Paper on Sexual Offences which forms the basis of the 2003 Act: Home Office (UK), *Protecting the Public: Strengthening Protection against Sex Offenders and Reforming the Law on Sexual Offences*, Cm 5668 (2002) [34].

⁴⁵⁴ *Sexual Offences Act 2003* (UK) s 75(1)(c).

despite the laudable intentions behind the reforms, and despite requiring evidence from the accused that he made some attempt to ascertain the presence of consent, in the end reasonableness may still be assessed in light of the defendant's unreasonable subjective beliefs. Research undertaken in the UK with mock juries confirms that many jurors interpret reasonable to mean 'reasonable for the particular accused'.⁴⁵⁵ Hence they are prepared to exonerate the defendant even where his belief in consent was predicated on objectively unreasonable indicia of consent. In the same study, the authors also found that those jurors who interpreted the provision as requiring an unmodified objective standard were less likely to empathise with the defendant,⁴⁵⁶ suggesting that if an objective standard is imposed there will be less opportunity for an accused to escape conviction on the strength of the discriminatory views about women that he holds.

One of the main arguments for adopting an objective standard in relation to belief in consent is the close physical proximity of the parties involved in sexual activity. In those circumstances it should be no great imposition to require them to check for mutual consent. The cogency of this argument derives from the fact that, even in the absence of violence or serious physical harm, unwanted sex amounts to a grave violation of an individual's physical integrity and sexual autonomy. However, the UK Parliament rejected an unmodified objective standard and also declined to provide legislative guidance on the nature of the circumstances which it is permissible to take into consideration in assessing the reasonableness of a mistaken belief. Instead relevancy is a matter for the jury to decide, 'subject to directions from the judge where necessary'.⁴⁵⁷ The vexed question of relevancy might have been avoided altogether if the legislation had instead included immature age or mental incapacity as a defence and retained an objective test for mistaken belief.⁴⁵⁸ This would have strictly limited the personal characteristics of an accused that are relevant to assessing the reasonableness of a mistaken belief and precluded consideration of the accused's ingrained prejudices as an explanation for his belief in consent. In keeping with the intent of the legislation, it would hold the accused to account by denying the exculpatory effect of dubious socio-sexual stereotypes.

⁴⁵⁵ Emily Finch and Vanessa E Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26(3) *Legal Studies* 303, 317.

⁴⁵⁶ *Ibid.*

⁴⁵⁷ United Kingdom, *The Government Reply to the Fifth Report from the Home Affairs Committee Session 2002–2003 HC 639*, Cm 5986 (2003) [3].

⁴⁵⁸ Temkin and Ashworth, above n 96, 341.

3.4.4 Canada

In Canada the offence of sexual assault, which includes sexual penetration, is made out by an intentional act of applying force ‘committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.’⁴⁵⁹ Section 273.2 of the Criminal Code creates a statutory bar to the availability of the common law defence of mistake of fact since it ‘identifies circumstances in which the common law defence of “belief in consent” ... may *not* be used.’⁴⁶⁰ As with much else in the law relating to sexual assault, the changes to the rules applying to the defence of mistake were implemented by Bill C-49. Section 273.2 reads:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
(a) the accused’s belief arose from the accused’s
(i) self-induced intoxication, or
(ii) recklessness or wilful blindness; or
(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

The availability of the defence is a question of law and the court in *Pappajohn v The Queen*⁴⁶¹ held that the defence must satisfy an ‘air of reality’ test before it may be left to the jury. L’Heureux-Dubé J explained this concept in *R v Park* stating:

[F]or there to be an “air of reality” to the defence of honest but mistaken belief in consent, the totality of the evidence for the accused must be reasonably and realistically capable of supporting that defence ... [T]hat evidence must amount to something more than a bare assertion.⁴⁶²

The air of reality test has been codified in s 265(4) of the Code which now requires that the judge be satisfied that there is sufficient evidence before leaving the defence to the jury. The requirement in s 273.2(b) that the accused take reasonable steps to ascertain consent imposes only a quasi-objective test on the assessment of the belief in consent since the objective reasonableness of the belief must be considered in light of the circumstances known to the accused at the time.⁴⁶³ Vandervort argues that the insertion of a reasonable steps requirement does no more than replicate the common law restriction on the availability of the defence where the accused was wilfully blind as to the risk of non-consent and stops short of prescribing an objective evaluation of the mistake

⁴⁵⁹ *R v Chase* [1987] 2 SCR 293 [11].

⁴⁶⁰ Lucinda Vandervort, ‘Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault’ (2004) 42(4) *Osgoode Hall Law Journal* 625, 628 n 9 (emphasis in original).

⁴⁶¹ [1980] 2 SCR 120.

⁴⁶² *R v Park* [1995] 2 SCR 836 [20].

⁴⁶³ *Criminal Code*, RSC 1985, c C-46, s 273.2(b).

defence.⁴⁶⁴ Other commentators instead insist that it was a ‘Canadian innovation’⁴⁶⁵ which modified the former wholly subjective test. Section 14A of the Tasmanian Criminal Code, which confines the assessment of the reasonableness of a mistaken belief in consent in certain sexual offences, was clearly inspired by the Canadian mistake provision. In both jurisdictions there is an onus on the accused to adduce evidence that he took reasonable steps to ascertain consent. Moreover, the belief must amount to a belief in consent as defined in the respective Criminal Codes.⁴⁶⁶

The Canadian Supreme Court in *Ewanchuk* articulated the correct approach to the test for mistaken belief in consent. The majority judgement declared that, ‘[i]n order to cloak the accused’s actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question.’⁴⁶⁷ It follows from this that if an accused is to rely on a mistaken belief in consent then this belief must be based on affirmative evidence of consent and cannot be supported by evidence that the complainant at least did not say no.⁴⁶⁸ The reasonable steps requirement and its interaction with the air of reality test was one site of disagreement between the majority and concurring judgements. Major J found that the question of whether the accused had undertaken reasonable steps to ascertain consent need only be considered once the air of reality test had been satisfied.⁴⁶⁹ L’Heureux-Dubé J disagreed. She found that the air of reality test as stated in *Pappajohn*⁴⁷⁰ had been modified by the enactment of s 273.2(b). It must now be considered in conjunction with the reasonable steps analysis. She argued that the air of reality test should not be divorced from the reasonable steps analysis and that the defence of mistake cannot be left in the absence of evidence of reasonable steps taken to ascertain consent. If the air of reality test precedes and is separate from the reasonable steps analysis, that would sanction the possibility that the court could find that the claim of mistaken belief in consent might have an air of reality even where it was objectively unreasonable. This would be at odds with the clear intent of s 273.2(b) to foreclose any judicial acceptance of a claim of

⁴⁶⁴ Vandervort, above n 185, 628 n 12.

⁴⁶⁵ L Gotell, ‘Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-inspired Law Reforms’ in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 209, 212.

⁴⁶⁶ *Dalwood v The Queen* (Unreported, Court of Criminal Appeal Tasmania, Burbury CJ, Crisp and Crawford JJ, 22 December 1967) 2; *R v Ewanchuk* [1999] 1 SCR 330 [49].

⁴⁶⁷ *R v Ewanchuk* [1999] 1 SCR 330 [46].

⁴⁶⁸ Further comment on the decision in *Ewanchuk* was given by Rosenberg JA in the case of *R v O (M)* (1999) 138 CCC (3d) 476 in the Ontario Court of Appeal. Although his was the dissenting judgment his reasons were subsequently approved when the case was appealed to the Supreme Court: *R v O (M)* [2000] 2 SCR 594. Rosenberg JA stated: ‘Applying *Ewanchuk*, the question was whether the accused honestly believed that the complainant had *communicated* consent’: *R v O (M)* (1999) 138 CCC (3d) 476 at [57] (emphasis added).

⁴⁶⁹ *R v Ewanchuk* [1999] 1 SCR 330 [60].

⁴⁷⁰ [1980] 2 SCR 120.

mistake which is unreasonable in the circumstances.⁴⁷¹ Her position is supported by the wording of s 265(4) whereby the presence or absence of reasonable grounds is expressly stated to have a bearing on the honesty of that belief.⁴⁷²

Although the effect of ss 273.1 and 273.2 should be to restrict the accused's reliance on rape stereotypes to enliven the defence of mistake the mere contemplation of the possibility of anointing an unreasonable belief with an air of reality 'preserves the structures and interpretive spaces which those stereotypes have typically inhabited'.⁴⁷³ This is certainly problematic from a theoretical perspective but, whilst it is to be hoped that decisions are made based on sound application of legal principles, the evidence is that even though the theory may be flawed at least from a practical perspective the quasi-objective test for mistake is having a positive effect on convictions for sexual assault. Various judicial statements post-*Ewanchuk* indicate an objective approach to the question of mistake. In *R v Patrick*⁴⁷⁴ Steinberg J stated: 'I do find that the accused ... ignored all of the obvious signs that any reasonable person would have noticed and heeded that she did not want sexual intercourse',⁴⁷⁵ a view consistent with that expressed in *R v MB*: 'Section 273.2(b) ... injects an objective standard for unreasonable sexual behaviour'.⁴⁷⁶ These hopeful observations, however, should perhaps be tempered by a note of restraint. Despite these singular examples, Sheehy contends that:

Although there are positive developments in some appellate decisions that set parameters around the availability of the reformed mistake defence, many other decisions ignore the larger policy and equality implications of the issues before them.⁴⁷⁷

She also observes that the Supreme Court of Canada has yet to give authoritative guidance on the principled approach to s 273.2.⁴⁷⁸

By virtue of s 273.2(a)(ii), mistaken belief in consent will not afford a defence where the accused chooses to ignore indications of non-consent or does not consciously advert to the question of consent, but absent recklessness or wilful blindness just how

⁴⁷¹ See Hester Lessard, 'Farce or Tragedy? Judicial Backlash and Justice McClung' (1999) 10(3) *Constitutional Forum* 65, 71.

⁴⁷² *Criminal Code*, RSC 1985, c C-46, s 265(4): 'Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.'

⁴⁷³ Lessard, above n 196.

⁴⁷⁴ [2002] BCPC 420.

⁴⁷⁵ *Ibid* [24].

⁴⁷⁶ [2001] OJ No. 1732 (CJ) (QL) [9].

⁴⁷⁷ Elizabeth Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* (University of Ottawa Press, 2012) 6 (forthcoming).

⁴⁷⁸ *Ibid* 10.

active his enquiries should be will depend on the particular circumstances of the case. As Helper JA explained in *R v Malcolm*:⁴⁷⁹

Parliament introduced s 273.2(b) to address those situations ... which may arise when the accused's conduct does not amount to recklessness or wilful blindness as to consent, but when the circumstances preceding the sexual activity call out for the accused to take positive steps to assure himself that the complainant is knowingly consenting to that activity.⁴⁸⁰

In *Cornejo*,⁴⁸¹ for example, the accused argued mistake on the basis that the complainant had lifted her hips to assist in removing her trousers. In that case the accused let himself into the apartment of a co-worker in the early hours of the morning and found her in an intoxicated slumber on the couch. There was no pre-existing sexual relationship between them and, on previous occasions, the complainant had made it clear that she was not sexually interested in him. The court held that in such circumstances the accused needed to take positive steps to secure an unambiguous indication of consent and it was not reasonable for him to rely only on his interpretation of the complainant's equivocal conduct.

The various jurisdictional responses to structuring statutory provisions relating to mistaken belief in consent can be broadly characterised in one of two ways. In Victoria, New South Wales and the UK, whether or not the accused took steps to ascertain consent is simply one of the factors to be taken into account in assessing the reasonableness of his mistaken belief in consent. In Canada and Tasmania, however, a failure to take reasonable steps to ascertain consent may establish conclusively that the mistaken belief is not reasonable. There is an onus on an accused who seeks resort to the mistake defence, to provide evidence that he actively sought from his partner confirmation of agreement. The grounding principles of mutuality and reciprocity evidenced in the definition of consent and the requirement of communicated consent in the Tasmanian reforms are emphasised by the limitations on the defence of mistaken belief in consent. This constitutes a strong endorsement of the idea that responsibility for establishing mutual agreement to the proposed conduct rests with both parties in sexual encounters.

3.5 Conclusion

The amended Tasmanian provisions share the animating concerns of the other reform initiatives but, whilst the imprint of earlier reforms can be discerned, the amendments to the Criminal Code exhibit unique features not found in other jurisdictions. Section 2A(2)(a) constitutes a clear legislative prescription that passivity equates with absence of

⁴⁷⁹ (2000) 148 Man R (2d) 143 (CA).

⁴⁸⁰ Ibid para 36.

⁴⁸¹ *R v Cornejo* (2003) 68 OR (3d) 117 (CA).

consent. No other jurisdiction provides such an emphatic endorsement of the ideal of communicative sexuality. In Victoria, for example, the fact of victim passivity is dealt with via mandatory jury directions. In terms of legal authority, jury directions do not carry the same weight as legislative prescriptions and, in their deliberations, juries may not accord them the authority that is given to statements of the law. Moreover, they may exacerbate the uncertainty about consent in the legal context because of their potential for creating jury misunderstanding and confusion. In a major report, the VLRC considered, as discussed earlier, the problems that the increased number and complexity of jury directions creates.⁴⁸² In endeavouring to appeal-proof charges to the jury some judges may feel constrained to give directions that are formulaic and overly legalistic or to give directions that are not strictly required by the facts of the case.⁴⁸³ The VLRC report quotes findings from a survey of Victorian criminal trial judges that the current complexity of jury directions is ‘a major impediment to effective communication’.⁴⁸⁴ The New South Wales legislation stops short of enabling proof of absence of consent on the basis of evidence of passivity. Instead, the effect of evidence of passivity is couched in negative terms such that a failure to offer physical resistance cannot, by itself, constitute consent.⁴⁸⁵ Similarly, the relevant Canadian consent provision also maintains at least an inferential connection with the out-dated resistance consent standard, by continuing to employ the terminology of submission or failure to resist,⁴⁸⁶ rather than stipulating that no consent exists in the absence of affirmatively expressed agreement. The Tasmanian reforms however, which embrace the principles of female sexual autonomy, and mutuality and reciprocity in sexual encounters are far removed from the mediaeval conception of passive, male-regulated female sexuality.

This chapter has considered reforms to the law of consent in the context of sexual offences in several common law jurisdictions. The purpose was to examine the potential of the different theoretical bases and schematic configurations of the various legislative instruments to preclude reliance on stereotypical reasoning in the sexual offence trial and to establish a frame of reference for the Tasmanian reforms. It is suggested that the unique features of the Tasmanian legislation avoid some of the criticisms that have been levelled at other reform initiatives. Even if the Tasmanian reforms are considered theoretically sound, their effectiveness can only truly be gauged by examining how they are being implemented in practice and assessing whether the spectre of rape myths is still

⁴⁸² Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009).

⁴⁸³ Ibid 32.

⁴⁸⁴ Ibid 31, quoting Elizabeth Najdovski-Terziovski, Jonathan Clough and James R P Ogloff, ‘In Your Own Words: A Survey of Judicial Attitudes to Jury Communication’ (2008) *Journal of Judicial Administration* 65, 80.

⁴⁸⁵ *Crimes Act 1900* (NSW) s 61HA(7).

⁴⁸⁶ *Criminal Code*, RSC 1985, c C-46, s 265(3).

present in the trial of sexual offences cases. To that end, the research project explores the way that legal actors approach the issues of absence of consent and mistaken belief in consent in the trial context and whether that approach mirrors the concern of the reforms to safeguard women's rights to choose when and with whom they wish to have sex. The next chapter describes the empirical research undertaken, explaining the rationale behind the project and outlining the methodological approach to the research. The chapter concludes with a brief description of each of the trials that were the subject of close analysis. The findings that are presented in subsequent chapters reveal how the Tasmanian legislation is being implemented and how effectively it is being put to work to realise the goals of the architects of the reforms.

Chapter 4: Research Design and Methodology

4.1 Introduction

In establishing, via s 2A(2)(a) of the Criminal Code, that proof of the absence of communicated consent is sufficient to prove non-consent the Tasmanian Parliament signalled an intention to reconfigure the understanding of rape to encompass cases where the stereotypical features of so-called stranger rape are not present. Stranger rape cases have traditionally been more likely to be prosecuted⁴⁸⁷ because they exhibit features that juries more readily recognise as the hallmarks of real rape:⁴⁸⁸ the presence of force; the absence of aspects of the victim's behaviour that might be viewed as precipitating the assault; fierce resistance by the victim; and prompt complaint.⁴⁸⁹ If the reforms are being understood and applied as Parliament clearly intended then, in order to acquit, the jury must fail to be satisfied beyond reasonable doubt that the complainant did not communicate her agreement. The previous chapter exposed some of the limitations of different reform initiatives in other jurisdictions and suggested that the Tasmanian reforms offer the promise of a more effective solution to the difficulties of successfully prosecuting rape cases.

In this, and subsequent chapters, the focus is on the empirical analysis of Tasmanian sexual offences trials, which is at the core of the thesis. The analysis seeks to determine whether or not the promise of the Tasmanian reforms is being realised. It is important to emphasise that this research has not been approached from the standpoint that all or indeed any of the trials under consideration were wrongly decided. It is not presumed that the trials have resulted in the acquittal of guilty accused. Instead, the purpose of the analysis that follows is to evaluate the extent to which counsel, and in particular Crown counsel, as well as the judiciary have recognised the problems associated with the pre-reform position and the extent to which they have understood and applied the reforms in constructing consent and non-consent. In doing so I question whether the evidence might have been marshalled differently to focus on and explore the conception of absence of consent set by the reforms. Whether this would have resulted in a different outcome cannot be predicted. Rather, what this thesis examines is whether the reforms have been given the opportunity to make a difference or whether rape trials

⁴⁸⁷ Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008) 17–19.

⁴⁸⁸ Natalie Taylor and Jenny Mouzos, Australian Institute of Criminology, *Community Attitudes to Violence Against Women Survey 2006: A Full Technical Report* (2006) ch 5.

⁴⁸⁹ Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (2007) 344 *Trends and Issues in Crime and Criminal Justice* 1.

continue to be run much as they were pre-reform and without adequately embracing those reforms. In brief, the research project consists of a qualitative content analysis of the transcripts of all relevant sexual offences trials heard in the Tasmanian Supreme Court in which the amended consent provisions were applied. At the most fundamental level, the transcripts were interrogated to determine how the concepts of consent and absence of consent were constructed by legal personnel. This entailed conducting a content analysis on the transcripts and coding relevant sections of text using QSR International's qualitative research software package, NVivo. In this process the following key thematic arguments relating to consent emerged from the data: first, evidence that the complainant manifested positive dissent was relied on as proof of absence of consent; second, absence of consent was explained in terms of evidence of force or evidence that the complainant feared that force would be used against her; and third, evidence that the complainant did not communicate agreement was used as proof of absence of consent. The results of the analysis are presented in the ensuing chapters as a series of critical case studies exploring how these themes were exemplified in particular trials.

Chapter 4 begins with an explanation of the research design and methodology, acknowledging the influence of earlier studies on the way that the current project was structured. It then explains the basis on which the cases and interviewees were selected, describes the features of the qualitative research software used to analyse the data that were significant for this study and discusses the approach that was taken to the task of analysis. The chapter concludes with a summary of the facts of each of the cases selected for detailed analysis.

4.2 Research Design

4.2.1 Methodology

An evaluation of the impact of the amended consent provisions might have proceeded in a number of ways. For example, changes in conviction rates for sexual offences may be a valid basis for assessing the effectiveness of the legislative amendments. However, although improvements in rates of conviction might suggest that the amendments have been effective they do not reveal anything about whether cases are being prosecuted in accordance with the theoretical principles promoted in the amended consent provisions or whether the improvements can be attributed to the adoption of such principles. The explanation for fluctuations in conviction rates may lie elsewhere. They may be a result of increased levels of reporting, changes in police and prosecution practices or changes in the nature of the cases themselves. Moreover, in a small jurisdiction such as Tasmania,

the data set may be too small to enable significant statistical conclusions to be drawn. Instead, since the principal concern of the research project was to establish what impact the new consent provisions are having on the prosecution of sexual offences cases, the appropriate course was to examine the way that the amendments are being applied and how they are operating in the trial. The primary methodological influence on the current research is an earlier study by Henning, which evaluated previous amendments to the consent provisions in the Tasmanian Criminal Code.⁴⁹⁰ Her findings on the operation of reforms to the Code enacted in 1987 formed the core of recommendations to the Tasmanian Government which led to the eventual enactment of the 2004 reforms. In a sense, therefore, the current research is a continuation of the ongoing monitoring of legislative attempts to improve the prosecution of sexual offences in Tasmania.

By adopting an approach to the current research that is consistent with previous studies, serial comparisons of the various reform initiatives are possible. Henning's research involved, in part, a qualitative content analysis of sexual offences cases tried in the Tasmanian Supreme Court between 1995 and 1999.⁴⁹¹ As in the current study, the basic unit of research was the criminal trial. Although Henning included quantitative findings such as the frequency of particular lines of defence, for example, or the outcomes of cases according to the lines of defence relied upon, the central focus in her study was the way that consent laws operate in sexual offences trials. Accordingly, the quantitative component of the analysis was accompanied by qualitative case study analyses of the trial transcripts.⁴⁹² Similarly, this research also employs a critical case study methodology to identify and examine the major themes employed in the trials to construct absence of consent or to create doubt about that element of the offence. The reason for approaching the research from a qualitative perspective is that quantitative techniques are not able to get under the skin of the trial transcripts and expose the subtle nuances and shades of meaning that only an intense examination of the text reveals. The purpose of the analysis was to gain an understanding of what was happening in sexual offences trials. The concern was not to identify whether the reforms have had an impact on conviction rates, nor to assess outcomes for particular lines of defence or particular constructions of consent. Such comparisons are of limited utility in answering the research questions explored by this thesis. Each case involves a unique set of facts and so outcomes in previous cases cannot accurately predict the likely outcomes of future cases.

⁴⁹⁰ Terese Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press, 2000).

⁴⁹¹ Ibid 37.

⁴⁹² In the report Henning acknowledges that her methodology was influenced by a New South Wales project which examined the effectiveness of legislative provisions protecting the rights of victims and witnesses in sexual assault cases: Ibid. See Department for Women (NSW), *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996).

The aim of this work is to analyse the information in the transcripts in context, to reveal participants' perspectives on and understanding of the legislation. The court actors' utterances were examined to determine whether the construction of consent and the figuring of the crime of rape in practice correlates with the model of proscribed sexual conduct set out in the legislation. The case studies are supplemented by interview responses from judges and prosecution and defence counsel about the efficacy of the reforms. Henning's findings are critical in the context of the current research because they clearly demonstrated the need for the sort of restructuring of the consent provisions that occurred in 2004. A comparison of the final recommendations of the two studies also reveals whether genuine progress has been made in the prosecution of rape and sexual assault. If the later findings are simply an echo of the earlier ones, the conclusion must be that it has not.

Content analysis is a research method characterised by the systematic application of pre-determined rules of coding to large volumes of text in order to classify the text into smaller thematic units or categories.⁴⁹³ Coding is the process of 'attach[ing] labels to segments of data that depict what each segment is about'.⁴⁹⁴ Content analysis allows the researcher to observe the emergence of predominant themes and patterns in the data, in this case, patterns relating to the way that the issues of consent and mistaken belief in consent were addressed. It constitutes an objective approach to the resolution of the research questions as it does not rely on the subjective impressions and recollections of the trial participants themselves about how they deal with the issue of consent. By employing this method of analysis, complex units of language could be analysed in context to uncover both explicit and implicit attempts to construct consent or absence of consent. The language of the courts is often specialised or esoteric and techniques of advocacy may also obscure the actual intent or import of verbal exchanges. For example, in an adversarial trial, counsel may wish to conceal from a witness the real purpose of a particular line of questioning hoping that the witness might thereby inadvertently concede the truth of an aspect of the opposition's argument. As a consequence, in some cases, the decision to ascribe a particular descriptive label to a unit of text might, at first glance, be criticised as unjustifiably subjective. However, the subjective interpretation of meaning is informed by the researchers' acquired understanding of legalese and adversarial technique, and by inferential reasoning derived from examining the text in context. The potential for researcher bias has been identified as an inherent weakness of this research

⁴⁹³ Steve Stemler, 'An Overview of Content Analysis' (2001) 7(17) *Practical Assessment, Research and Evaluation* <http://PAREonline.net/getvn.asp?v=7&n=17>.

⁴⁹⁴ K Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (Sage, 2006) 3.

method,⁴⁹⁵ but doubts about the objectivity of the research and researcher bias can be addressed by ensuring objectivity in the selection of trials for research and by developing a consistent, systematic and replicable coding scheme.

4.2.2 Selection of the Research Data—Cases and Interviewees

The research project consisted of two data sets:

- the transcripts of contested sexual offences which were tried in the Tasmanian Supreme Court between December 2004 and October 2008 in which absence of consent or mistaken belief in consent was in issue and to which the amended consent provisions in the Criminal Code applied and
- responses to interviews conducted with legal personnel.

A list of all sexual offences cases that went to trial since 17 December 2004, when the amended provisions of the Criminal Code came into force, was obtained from the Tasmanian Director of Public Prosecutions. In some of these cases the former consent provisions continued to apply as they dealt with offences that had allegedly occurred prior to the enactment of the amendments. These cases were excluded from the study. Trials of child sexual offences where consent is not an ingredient of the offence were also excluded from the study as well as any adult sexual offences cases where consent was not in issue, for example, where the only issue at trial was whether the alleged acts had in fact taken place or where the identity of the attacker was disputed. These were the only bases on which trials were excluded. This process resulted in a total of 19 trials that satisfied the selection criteria for inclusion in the research. The outcomes of these trials in relation to sexual offences charges only are shown in Table 1.

Table 1 –Outcomes for All Trials

Trial Verdict	Number of Trials
Guilty of all sexual offence counts	4
Guilty of some sexual offence counts	3
Acquittal of all sexual offence counts	10
Acquittal of some sexual offence counts + hung verdicts on other sexual offence counts	2

⁴⁹⁵ Richard H Kolbe and Melissa S Burnett, 'Content-Analysis Research: An Examination of Applications with Directives for Improving Research Reliability and Objectivity' (1991) 18(2) *Journal of Consumer Research* 243, 244.

The trial transcripts were obtained from the Supreme Court Registry in Hobart. The earliest of the post-amendment trials was heard in June 2006. The apparent delay in bringing the first prosecutions under the new provisions, given that the amendments came into force on 17 December 2004, can be explained by the length of time required to take a matter to court once the initial report has been made to police. All available transcripts of the cases were obtained from the Supreme Court Registry as Word documents. Since it was not possible to continue to add trials to the study indefinitely the decision was made to adopt a cutoff point of October 2008. Attempts were made to obtain the complete transcript of all trials including opening addresses by counsel, examination-in-chief and cross-examination of both prosecution and defence witnesses, closing addresses to the jury by counsel and summing up by the judge. However this was not possible for all cases and in only one instance was the complete trial transcript available. For many trials opening and closing addresses had not been transcribed and, where all matters relating to the case had been finalised, including the expiration of any sentences, there was no obligation to retain the original recordings.⁴⁹⁶ Opening addresses were obtained for nine trials and closing addresses for only three. However, since these addresses are a summary of the respective arguments their substance is apparent in any case from the body of the trial proceedings and they are summarised by the judge in his or her charge to the jury. Therefore their absence did not materially affect the conduct or outcome of the research.

The other data set consisted of the responses to interviews conducted with judges of the Supreme Court of Tasmania and legal practitioners admitted to the Tasmanian bar specialising in the area of sexual offences. The purpose of this aspect of the research was not to conduct a comprehensive analysis of the responses of the legal profession to the Code amendments. The interviews were very much ancillary to the main purpose of examining what the transcripts of trials revealed about the operation of the reforms. It was considered, however, that the research would not be complete without providing an account of legal actors' experiences of working with the new provisions. The semi-structured format sought to glean interviewees' opinions about the need for the reforms, the appropriateness and effectiveness of the definition of consent, the impact of s 14A and the effect that the amendments have had on their practice of the law. Since Tasmania is a relatively small jurisdiction it was feasible to interview all senior practitioners experienced in the conduct of sexual offences trials. A total of nine interviews were

⁴⁹⁶ The complete transcript, including opening and closing addresses and judge's summing up, was obtained for one trial. In nine trials the closing addresses were not obtained. In three trials the opening addresses were not obtained. In six trials neither the opening addresses nor the closing addresses were available. In the remaining trial the prosecution filed a nolle prosequi late in proceedings and the jury was directed to bring in a verdict of not guilty. Accordingly, there were no closing addresses or judge's summing up in that case. Opening addresses were also not available.

completed, three with defence counsel, prosecution counsel and criminal trial judges respectively. These interviews were recorded and later transcribed and subjected to the same sort of analysis as the trial transcripts.⁴⁹⁷

4.2.3 Research Questions

The treatment of the issue of consent to sexual intercourse was examined to determine whether or not it accorded with the intent of the amended legislation and whether in fact the amended provisions have ushered in a new approach to the task of establishing the ingredient of absence of consent or of evaluating the mistake defence in sexual offences trials. The trials were analysed with the following objectives in mind:

- 6) To determine whether there has been a change in the nature of the cases being prosecuted.
- 7) To examine the way in which the concept of consent to sexual intercourse is dealt with by the Crown, by the defence and by the trial judge, and in doing this to determine whether the central concern of the court has moved away from evidence of communicated refusal of consent to evidence of communicated agreement, or the absence thereof.
- 8) To investigate the circumstances in which the defence of honest and reasonable but mistaken belief in consent is left to the jury, including:
 - whether the evidentiary foundation sufficient to raise the defence of mistaken belief in consent has become more demanding in light of the fact that s 14A now requires that the accused adduce evidence of reasonable steps taken to ascertain consent if he wishes to rely on the defence;
 - whether the reasonableness of such a belief continues to be filtered through traditional assumptions and prejudices about female sexuality;
 - how juries are directed in relation to mistaken belief in consent.

The research questions guided the analysis and coding of the data but the research questions themselves were influenced by other work in the area of sexual offences. For example, the results of a multi-jurisdictional study of decisions made by Crown Prosecutors in adult sexual assault cases found that cases were significantly less likely to be withdrawn by prosecutors and proceed to trial where there was, *inter alia*, evidence that the victim manifested dissent or where there was evidence that force was used to

⁴⁹⁷ Ethics approval to conduct the interviews was obtained from the Tasmania Social Sciences Human Research Ethics Committee, reference number H11404.

procure submission.⁴⁹⁸ This study can legitimately be grouped within the same domain of research, as the findings of both studies reveal the dominance of kindred themes in the prosecution of the sexual offences trials examined.

4.2.4 The Research Software- NVivo

The transcripts and interviews were analysed using the qualitative data analysis software package, NVivo. There are a number of reasons why this particular software package was chosen. The NVivo software enables the researcher to create projects or files by transcribing data directly into the project or by importing textual documents in different formats.⁴⁹⁹ The design is familiar because it is based on the Microsoft user interface guidelines and it is therefore relatively simple to use. The software offers features such as the annotation, memo and 'see also' link functions that help guarantee the academic rigour of the research and greatly enhance the depth of analysis that is possible. The annotation function enables the researcher to add comments to selected portions of text as the text is being scrutinised. These comments are a useful means of capturing impressions and unformed ideas that can eventually be incorporated in a more developed way into the final analysis. As each portion of text is labeled, or coded, the memo function allows the user to attach detailed notes to the code in the form of a memo which explains how it is circumscribed. Ensuring consistency in the way that text is coded is also aided by the facility to include, when creating a new category, a description of the type of text coded at that category. The links feature, as the name suggests, allows the researcher to link data sources or text within a single data source at those points in the data where useful comparisons or contrasts can be made or where contradictions exist. Each trial represents a single data source within the project. These raw data sources are analysed by a process of repeated sorting, labelling, re-sorting and re-classifying. Over time more and more nuanced meaning is captured as categories are refined and connections between categories become apparent. Since each occurrence of text that relates to the construction of consent or absence of consent is coded it is possible to capture not only the different thematic representations of the concepts but, importantly, the frequency with which the distinct themes appear. This is an essential aspect of the

⁴⁹⁸ Denise Lievore, Office of the Status of Women, *Prosecutorial Decisions in Adult Sexual Assault Cases* (2004) 1. See also Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) 39 *Crime and Justice* 565; Liz Kelly, Her Majesty's Crown Prosecution Service Inspectorate, *Routes to (In)justice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases* (2001); Cassia Spohn, Dawn Beichner and Erika Davis-Frenzel, 'Prosecutorial Justifications for Sexual Assault Case Rejection: Guarding the "Gateway to Justice"' (2001) 48(2) *Social Problems* 206.

⁴⁹⁹ The package also enables audio, video and other pictorial data to be imported but this research was limited to textual sources.

research. Before it can be established whether or not the legislation is being applied as intended it must first be determined how the question of consent is actually being conceptualised in the trials and whether particular themes predominate.

The NVivo software refers to categories as ‘nodes’. At the beginning of the coding process a source may be organised into many different nodes but as the project progresses it becomes clear that some apparently distinct nodes really deal with the same theme or that others are more appropriately considered as sub-categories rather than categories in their own right. NVivo allows the user to merge nodes where it appears that duplication has occurred and also to create hierarchies of nodes. To take an illustrative example, where questions in cross-examination are apparently designed to demonstrate that the complainant had consented to the sexual acts, the exchange is initially coded at the category entitled ‘questions about consent’. This category is clearly too broad to yield significant information about the way consent is constructed thus, as the coding process continues sub-categories develop that more precisely describe the thematically distinct nature of the questions. So, the following exchange:

Defence Counsel: When he put his arm around you I suggest to you that you didn’t say to him, ‘Don’t do that’, or pull away or anything like that?

Complainant: No, I was nervous.

Defence Counsel: But you didn’t ask him to take his arm away, did you?

Complainant: No.⁵⁰⁰

is coded at the sub-category, ‘questions about lack of resistance’, which resides within the broader category, ‘questions about consent’. In this way a nuanced classification of the data can be achieved. The researcher can choose to compare all the portions of text coded at a particular category (or a combination of two or more categories) so the process of reclassification and refinement of categories is simplified. If, on further reflection, guided by the detailed description of the category provided in an attached memo, an extract no longer seems to fit within a particular category it can be transferred with a single mouse click to a more appropriate category. The other significant advantage of NVivo is that the user can easily navigate between a display of the specific coded section of text in isolation to a view of it in context. Given the inferential nature of qualitative research, reference to context is vital to support the conclusions that the researcher has drawn from the data.⁵⁰¹

⁵⁰⁰ Horne’s Case.

⁵⁰¹ Further information about the NVivo software can be obtained from the QSR International website at <[http:// www.qsrinternational.com/](http://www.qsrinternational.com/)>.

4.2.5 Development of the Coding Scheme

There are two techniques used to classify data in a content analysis. Text may be coded according to pre-determined categories, referred to as ‘a priori’ coding, or the categories may be established as the text is analysed, a technique referred to as ‘emergent’ coding.⁵⁰² The approach in this research was to develop categories progressively as the transcripts were examined so the creation of the coding scheme was dictated by themes latent in the content of the transcripts rather than by any pre-conceived ideas about how the issue of consent would be approached by counsel.⁵⁰³ The researcher developed great familiarity with the data through a prolonged period of immersion in the cases. The continual re-examination and refinement of the data facilitated the progression from the initial low-level coding, characterised by the creation of numerous, seemingly unconnected categories of references to consent, to higher level coding, where the interconnectedness of coded text and the existence of over-riding themes became apparent. The examination of the trials was guided by two main preoccupations:

- How has consent or its absence been constructed?
- What are the evidentiary limits placed around the defence of mistaken belief in consent?

The search for answers to these questions generated a coding structure that was composed of distinct themes or patterns which in turn enabled the often very large documents to be organised in a way that was conducive to a systematic and in-depth analysis of their content.

An essential test of reliability⁵⁰⁴ for any research is the degree to which results can be reproduced by an independent researcher using the same rules and procedures. As different categories emerged from the data they were precisely defined to ensure a consistent and reliable coding process that could readily be adopted by different researchers if necessary. These definitions became the templates according to which

⁵⁰² R Weber, *Basic Content Analysis* (Sage, 2nd ed, 1990).

⁵⁰³ This process derives from the grounded theory methodology of data analysis. According to this research methodology, theoretical explanations for phenomena observed in the data sources are grounded in the text of the sources themselves. This may be contrasted with other methods which approach the analysis of data from a pre-determined theoretical perspective. Originating with the sociologists Glaser and Strauss in 1967, grounded theory has been adapted to fit different research disciplines. See B G Glaser and A L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing, 1967); J Corbin and A Strauss, *Basics of Qualitative Research* (Sage, 3rd ed, 2008); Charmaz, above n 8.

⁵⁰⁴ In qualitative research, rather than referring to the reliability or validity of results, more appropriate terms might be quality or dependability. See, for example, the discussion in Ken Crawford, Marnie Leybourne and Allan Arnott, ‘How We Ensured Rigour in a Multi-Site, Multi-Discipline, Multi-Researcher Study’ (2000) 1(1) *Forum: Qualitative Social Research* <<http://www.qualitative-research.net/fqs-texte/1-00/1-00crawfordetal-e.htm>>.

subsequent portions of text were classified. For example, when the definition attached to the category, 'Evidence of force or fear' is accessed the following description appears on screen:

Text is coded at this node where it reveals evidence that physical force was used by the accused to sexually assault the complainant or that she feared the use of such force. Includes evidence of physical injury, evidence of threatening or aggressive language and expressions of fear by the complainant. It also includes references to size or strength differentials between the complainant and the accused.

As the analysis progressed the categories were gradually refined, eliminating duplicate categories and redefining categories to ensure that the definition covered all examples coded within that particular category.⁵⁰⁵

4.3 Analysis of the Transcripts

In criminal cases the Crown bears the burden of proving guilt by satisfying the jury of all the elements of the offence beyond reasonable doubt. Although the defence is under no legal obligation to disprove the prosecution case, in practice the defence will generally call its own witnesses and subject prosecution witnesses to cross-examination in order to undermine the prosecution arguments and create a reasonable doubt in the minds of the jury members about whether the prosecution has discharged the onus of proof. The central contentious element in all the trials examined for this research was the issue of consent, including consideration of the issue of mistaken belief in consent. Bearing as it does the onus of proof, the task for the prosecution was therefore to persuade the jury beyond reasonable doubt that the complainant did not consent to the sexual conduct that was the subject of the charge or that the defendant did not honestly or reasonably believe that the complainant did consent. In examining each of the trials the researcher sought to identify how the Crown constructed absence of consent, how the defence constructed consent and how both sides marshalled the evidence to these ends. The trials were analysed in separate sections: the prosecution component which contained all the trial material originating with the prosecution; the defence component which contained similar material originating from the defence; and the judges' rulings and summations. The trial transcripts were broken up in this way in order to highlight patterns in the way the various trial actors approached the questions of consent and mistaken belief in consent as well as to enable comparisons to be drawn between the approaches of the different legal personnel. Subdividing the transcripts also facilitated greater familiarity

⁵⁰⁵ These two essential requirements of an efficient coding scheme are called mutual exclusivity and exhaustiveness. See Stemler, above n 7.

with and recall of the substance of individual trials. It was reasoned that a long transcript was more easily digestible when split into several shorter pieces.

4.3.1 The Prosecution Component

The data set for the prosecution component of the research consisted of opening addresses by prosecution counsel (9 cases), examination-in-chief of prosecution witnesses, cross-examination of defence witnesses, legal argument in relation to contested evidence and closing addresses to the jury (3 cases). In broad terms the prosecution approached the problem of satisfying the jury of the absence of consent in one of the following ways:

- by adducing direct evidence of absence of consent, such as evidence of physical injury sustained by the complainant;
- by attempting to preclude reliance by the defence on a claim that the accused honestly and reasonably although mistakenly believed that the complainant was consenting;
- by establishing that the prosecution witness (including but not limited to the complainant) is a reliable witness of events such that the testimony given should be accepted as evidence of non-consensual sex;⁵⁰⁶ or
- by establishing that the defence witness is an unreliable witness of events such that claims of consensual sex or mistaken belief in consent should be disbelieved.

Each trial was exhaustively analysed and relevant sections of the transcripts were coded to one or more of these main categories as appropriate. Since direct evidence of absence of consent was adduced both to establish that the sexual conduct was non-consensual and to preclude the accused's reliance on mistaken belief in consent these two varieties of evidence were coded at the same category. The three primary level categories were labeled 'Construction of absence of consent', 'Complainant's credibility' and 'Defendant's credibility'. As coding progressed it became clear that further sub-categories could be created according to the different types of conduct that the text was concerned with. For example, depending on the evidence adduced in examination-in-

⁵⁰⁶ By virtue of ss 101A and 102 of the *Evidence Act 2001* (Tas) the prosecution is prohibited from adducing evidence that is relevant only because it affects the assessment of the credibility of a witness or another person. Such evidence may be adduced if it is relevant for another purpose or in accordance with the exceptions to the credibility rule in ss 106 and 108 of the Act. Section 106 provides that the court may grant leave to adduce evidence to rebut denials by a witness in cross-examination. Section 108 provides that the court may grant leave to adduce evidence in re-examination to re-establish a witness's credibility.

chief, text that represented direct evidence of absence of consent might be classified within the sub-categories ‘Capacity to consent impaired by alcohol or other drugs’ or ‘Evidence of force or fear of force’. These sub-categories, remembering that they were created in response to the content of the transcripts themselves,⁵⁰⁷ thus represented the primary bases upon which prosecution counsel constructed absence of consent. Once the primary basis upon which absence of consent was constructed had been identified it became possible to assess whether or not the construction of consent mirrored the definition of consent as ‘free agreement’ in the legislation and hence whether those provisions were being implemented as intended. In this way the research aimed to expose any divergence ‘between law enacted and law in action’.⁵⁰⁸ Analysis of the prosecution component revealed that non-consent was constructed around four major themes, listed here in order of the frequency with which they appeared. The figures in brackets show the number of cases in which each theme was evident:

- absence of consent was evidenced by the complainant’s responses to the assault, particularly the fact that she made a prompt complaint. In seeking to demonstrate that the complainant reacted as a genuine victim would be expected to, such evidence functioned to establish the complainant’s credibility (18 cases);
- absence of consent was evidenced by the complainant’s positive manifestation of dissent (13 cases);
- absence of consent was evidenced by the defendant’s use of force or the complainant’s fear that force would be used against her (12 cases); and
- absence of consent was evidenced by the non-communication of consent (10 cases).

4.3.2 The Defence Component

The data set for the defence component of the trials comprised opening addresses by defence counsel (6 cases), cross-examination of prosecution witnesses, examination-in-chief of witnesses for the defence, legal argument in relation to contested evidence and defence closing addresses (3 cases). The selection and categorisation of text followed the same process as that used in the prosecution component except that relevant evidence dealt with establishing the presence rather than the absence of consent. Only text that was relevant to the issue of consent or mistaken belief in consent was selected and coded. The defence constructed arguments for their case in three distinct ways:

⁵⁰⁷ See discussion of emergent coding above 126.

⁵⁰⁸ Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 5.

- by drawing an inference of consent from the complainant's outward behaviour;
- by arguing that the complainant's behaviour provided an evidentiary basis for an honest and reasonable but mistaken belief in consent by the accused; or
- by presenting the prosecution witness (particularly the complainant) as an unreliable witness of events.

Again, no distinction was drawn by defence counsel between evidence that directly supported an inference of consent and evidence that supported a mistaken belief in consent. There were no trials in which the defence case was put on the basis that the accused mistakenly believed the complainant was consenting rather than that she was in fact consenting. Accordingly, the defence components of the trials were classified according to two primary categories of evidence, either 'Construction of consent' or 'Complainant's credibility'. These primary level categories were further sub-divided in accordance with the type of conduct they examined. For example, evidence that was probative of consent might be further particularised as 'Lack of resistance' or 'Complainant's voluntary contact with the accused'.

Analysis of the defence component revealed that five main arguments were proffered either singly or in combination as evidence of consent:

- the complainant had a motive to falsely allege absence of consent (13 cases);
- the complainant demonstrated a desire for contact with the accused (12 cases);
- the complainant's consent, though perhaps out of character, could be explained by the disinhibiting effects of self-induced intoxication. The complainant was not sufficiently intoxicated, however, to be incapable of giving consent (12 cases);
- the complainant behaved provocatively towards the accused (9 cases); and
- the complainant was an unreliable witness as evidenced by her poor performance under cross-examination (9 cases).

4.3.3 The Judicial Component

The data set for the judicial component of the trials consisted of argument on the voir dire and rulings in relation to matters contested therein and judges' summing up to the jury. The role of the trial judge is quite distinct from that of prosecution or defence counsel. The trial judge's role is largely reactive in that he or she responds to the case as it is put by counsel. It would be incorrect to talk about the judge's component in terms of arguments for the absence or existence of consent. Rather, this component of the trials was analysed to establish how the judges interpreted the consent provisions and what evidence was considered sufficient to support the defence of mistake. In particular, the

analysis sought to determine whether the changes wrought by s 2A(2)(a) and s 14A had been explicitly incorporated into judicial explanations of the element of absence of consent and the availability of the defence of mistaken belief in consent.

4.4 The Cases

The results of the analysis are presented in the following chapters in the form of case studies⁵⁰⁹ that probe individual trials in detail and create a contextually rich interpretation of the way that the cases were argued or presented by the different trial participants. The case studies provide an account of how the issue of consent was handled by both the prosecution and defence and how the consent and mistake provisions were interpreted by the bench. The initial coding process revealed the different ways that consent was constructed in the data sources as a whole. The separate data sources were then organised thematically, according to the basis which the prosecution relied upon to argue absence of consent, and finally, individual trials were selected as representatives of the larger thematic groups. A number of considerations were critical to the decision to select representative trials for close analysis rather than discuss all trials included in the study in detail. First, it was not practical to write up an analysis of each of the trials in the study. An exercise of that magnitude would have delivered an unduly lengthy and unwieldy thesis without adding to the depth of the analysis as a whole. Instead, representative trials were selected on the basis that they exemplified arguments advanced in other trials and findings that could be generalised to other cases. Second, some of the discussion of separate cases would have been, in many instances, merely a restatement of inferences and observations made elsewhere in relation to other cases. Third, although a number of cases could be accurately described as typifying a particular approach to consent or absence of consent, the articulation by the legal officers of the basis on which consent was constructed was not uniformly clear across the data set nor, for analytical purposes, necessarily engaging. Accordingly, the specific cases were singled out for more intensive analysis on the basis that they exemplified particular arguments about consent and for the richness of textual examples that they offered to demonstrate how these arguments played out in court.

The following trials were selected as representative of the thematic group to which they belonged. Brennan's Case and Horne's Case are discussed as exemplars of

⁵⁰⁹ The term 'case study' does not refer to a single, unique research methodology. See John Gerring, 'What Is a Case Study and What Is It Good for?' (2004) 98(2) *American Political Science Review* 341, 341–2. For the purposes of this research I adopt Gerring's definition of a case study as, 'an in-depth study of a single unit ... where the scholar's aim is to elucidate features of a larger class of similar phenomena': at 341.

the way that the Crown used evidence of the complainants' manifest dissent or resistance to argue absence of consent. These trials stood out from the other 11 cases in which the Crown constructed absence of consent on the basis of manifest dissent by virtue of the prominence given to such evidence in the transcript, the numerous references to resistance in both examination-in-chief and in cross-examination and the amount of detail that was given about the nature of the resistance. They therefore offered scope for richer analysis than the remaining trials in which evidence of dissent did not form such a central part of the prosecution case. Riley's Case and Allen's Case are discussed as exemplars of the Crown's use of evidence of force or the fear of force to construct absence of consent. Again, these cases were distinguished by the weight of evidence of force that was presented and by the objective seriousness of force that the evidence revealed. If the Crown could not persuade a jury that there was no consent in such violent circumstances then it is probably safe to conclude that proof would be even more problematic where the evidence revealed relatively minor force. Accordingly, the findings from the selected cases about the difficulties that the Crown faces in relying on evidence of force to construct absence of consent would apply all the more to the remaining ten cases in which consent was argued on the same basis. Savage's Case and McCaffrey's Case exemplify the way that the Crown relied on evidence that the complainant did not communicate consent to argue that she did not consent. In all the trials in which absence of consent was constructed in this way the Crown argued that the complainant failed to communicate consent because she was either asleep or grossly intoxicated. Savage and McCaffery are distinguished because in both these cases there was a live issue about whether or not the complainant was genuinely incapacitated and that issue was central to the outcome of the case. In the other eight trials in which a failure to communicate consent was raised as an issue there was either no argument that the complainant was incapable of giving consent or the argument constituted only a minor aspect of the Crown case.

The major prosecution themes identified above determine the structure of the account, but the discussion also analyses how the main arguments identified in the defence component were marshalled in opposition to the Crown case. Arguments that seek to establish witness credibility, although important in the context of all of the cases, have not been examined as a separate category. The reason is that fundamentally such arguments function as inducements to accept the construction of consent or absence of consent that other arguments in the case put forward. So, for example, if the complainant is able to give consistent testimony about the smallest details of the assault, this is evidence that her testimony is true. If there is evidence of recent complaint, for example, this too may be regarded as evidence that she is a genuine rape victim and thus that, once

again, her testimony is true. Given the all-pervasiveness of arguments and implications about both the complainant and the accused as reliable witnesses it is somewhat artificial to select only a few trials to illustrate this theme. Therefore, the issue of credibility is discussed in more general terms with illustrative examples taken from particular trials as appropriate. What is immediately clear from the description of the themes identified above is that prosecutors are failing to appreciate fully the real differences in approach that the 2004 amendments should have enabled. In particular, rather than exploiting the new s 2A(2)(a) and its requirement that the Crown case be met by evidence of affirmatively communicated consent, cases continue to be argued in line with pre-reform ideas about female sexuality and expected victim responses to rape and sexual assault. The analysis also reveals that prosecutors do not contest the defence reliance on these stereotypes in arguing their case before the jury. There is thus no pressure on the defence to change their approach when they are able to achieve high rates of acquittal by continuing to invoke pre-reform arguments for the existence of consent.

This chapter concludes with a summary of the factual circumstances and trial outcomes of the cases selected for more detailed analysis. As stated previously, these cases were selected from the 19 cases in the study because they exemplify the major themes identified in this chapter that were used in the construction of consent or absence of consent.

4.4.1 Brennan

Brennan was charged with a single count of aggravated sexual assault, three counts of indecent assault and one count of rape. The complainant and the accused had spent the day in company with others drinking at various locations. The accused ended up staying the night at the house that the complainant shared with her brother. After the other occupants of the house had gone to bed for the night the complainant remained alone with the accused watching television. According to the complainant's version of events, at this point the defendant physically restrained her and then raped and sexually assaulted her. Absence of consent was constructed by the prosecution principally by adducing evidence that the complainant repeatedly manifested her unwillingness to engage in sexual conduct with the accused. The complainant was 16 years old and the accused was 25. In light of the disparity in age the prosecution also argued, albeit less insistently, that the complainant was a naïve young girl who found herself in a situation that had escalated beyond her control. The defendant admitted guilt in relation to the first four charges, not on the basis that the acts were unlawful because the complainant had not consented to the sexual conduct, but in recognition of the fact that she was underage. He

denied the allegation of rape. The defence argued that the complainant had been the sexual aggressor and that her allegations were motivated by fear of her boyfriend's reaction if it was revealed that she had engaged in consensual sex with the accused. The accused was acquitted of the charge of rape but, in view of the fact that sexual intercourse was admitted, he was convicted of the alternative charge of sexual intercourse with a young person.

4.4.2 Horne

Horne was charged with two counts of rape and one count of indecent assault. The accused made contact with the complainant via an online dating service. After some months of intermittent electronic communications they agreed to meet in person. The encounter occurred at the complainant's house. According to the complainant, within a very short time of his arrival, Horne sexually assaulted her and then raped her. The prosecution constructed absence of consent primarily on the basis that the complainant made it clear that she did not want to have sex, even though the evidence that she manifested dissent was not strong. This was supported by evidence of recent complaint and forensic evidence of physical injury. The accused argued that the sexual activity was consensual and that the complaint to police was motivated by feelings of shame and anger. Horne claimed that, after they had sex, he told her that he did not wish to pursue a relationship with her. The defence sought to create doubt about the ingredient of absence of consent by drawing an inference of consent from her willingness to invite him into her home and by her failure to voice sufficient objection to the sexual activity.

4.4.3 Riley

Riley was charged with one count of stalking, one count of abduction and three counts of rape. A submission by the defence that there was no case to answer was upheld in relation to the single count of stalking and accordingly the jury was directed to acquit on that count. The other counts, those of abduction and rape, arose out of a single series of events. The complainant and the accused had been involved in an on again/off again relationship. They had children together. There was evidence that the relationship had been violent and at the time of the alleged offences there was a restraint order in place limiting the accused's contact with the complainant. On the day of the offences the accused confronted the complainant at her place of work and demanded that she leave with him. She complied with his demand and he took her to his grandmother's house where the alleged rapes took place. The prosecution constructed absence of consent around evidence of force or fear of force and used evidence of the violent nature of the

prior relationship to give context to the complainant's failure to resist the accused strongly. The defence argued that there was no evidence that the complainant was genuinely fearful of the accused and that because of their long-standing relationship the accused was justified in interpreting the complainant's acquiescence as real consent. Riley's Case is noteworthy because it is perhaps the first case which considers in any significant detail the import of the 2004 reforms. However, in so doing, it concludes that the reforms were intended to operate as an extension of the previous state of the law rather than to introduce a radically different approach to the issue of consent. The jury was unable to reach a verdict in relation to the count of abduction but brought in majority verdicts of not guilty in relation to the three counts of rape. The implication of this is that some jurors could not agree that the accused abducted his ex-partner, nor could they agree that this was not proved beyond reasonable doubt. In light of their decision to acquit on the charge of rape it is therefore clear that, somewhat surprisingly, the jury was prepared to entertain concurrently two apparently contradictory beliefs – that the complainant may have been abducted and that her later acquiescence to sexual intercourse was freely given.

4.4.4 Allen

Allen was charged with two counts of rape and one count of assault. The complainant was his former partner. There was a history of violence between them but, although there was a restraint order in place against the accused, at the time of the allegations the two had resumed a sexual relationship by mutual agreement. In relation to the first count of rape the complainant alleged that she was woken one morning by the accused's attempts to have anal sex with her and, in relation to the second count, she alleged that he forced himself upon her after a series of violent assaults. The prosecution sought to establish absence of consent principally on the basis that physical force was used by the accused to sexually assault the complainant or the threat of force secured her acquiescence to sex. Defence counsel used evidence of the nature of the pre-existing sexual relationship to represent the complainant as a woman who enjoyed rough sex to defeat the allegations of rape.

4.4.5 Savage

Savage was charged with a single count of rape. Both he and the complainant had been at a party at the local football clubrooms. The complainant left to walk the short distance home and the accused followed and offered her a lift in his car. When they reached her house he came in with her and they ended up on a couch together. The complainant

contended that she had no memory of events after this point but she knew she did not want to have sex with him. According to her version of events she regained consciousness to find the accused having intercourse with her in her bed. In arguing that no consent was given, the prosecution relied on s 2A(2)(h) of the Criminal Code, that is, that the complainant was either unconscious or so affected by alcohol that she was unable to form a rational opinion in respect of consent to sexual intercourse. In connection with this there was a barely articulated suggestion running through the course of examination-in-chief that the complainant may have been the victim of drink spiking. The defence did not deny that the complainant was intoxicated but argued that she was disinhibited rather than incapacitated. Evidence was led that, as a result of the encounter, the complainant had contracted a sexually transmitted disease and the episode had become a topic of local gossip. In light of this, defence counsel argued that her eventual report to police was motivated by concern to protect her reputation. The difficulty for the prosecution was that, absent independent evidence of her degree of intoxication, the jury might have been sceptical about the proposition that she was totally incapacitated. This would be particularly problematic if there was evidence that she was otherwise able to perform certain motor tasks and converse coherently. Unless the jury was convinced that the complainant was effectively unconscious they might also have considered it unfair to expect the defendant to be able to assess her level of intoxication in such a situation. However, had the prosecution made the question of positively conveyed consent the focus of witness examination, the jury may have been left with a question about the absence of affirmative indications of consent. Savage was found not guilty by unanimous verdict.

4.4.6 McCaffrey

McCaffrey's Case shared some factual similarities with Savage in that it also involved an allegation that the accused had sexual intercourse with the complainant while she was either unconscious or asleep due to the effects of alcohol. McCaffrey was charged with one count of rape. The accused and the complainant were flatmates. On the night of the alleged sexual misconduct they had been drinking together at home. At some point the complainant fell asleep on the couch. On her account, she later briefly regained consciousness and became aware that the accused was having sex with her. The prosecution again relied on s 2A(2)(h) of the Criminal Code, arguing that the complainant was incapable of giving consent. The defence perspective was that the allegation had been fabricated because she regretted having had consensual sex with the accused. They asserted that she was not incapacitated by alcohol to the degree required

by s 2A(2)(h) but was an active participant. As was the case in *Savage*, the jury was thus primarily concerned with weighing the evidence relating to the complainant's degree of intoxication rather than weighing the evidence relating to the positive communication of consent. The jury found the defendant not guilty by unanimous verdict.

4.5 Conclusion

In the next three chapters the findings of the analysis of the cases are presented, arranged according to the three major themes of the prosecution construction of consent. Each of the chapters takes as its focus a separate theme. Individual cases in which that particular theme was pre-dominant are discussed to demonstrate more generally how the element of absence of consent was constructed, how reasonable doubt was created about that element and the basis on which the mistake defence was argued. In light of the findings, an assessment is made of the way that the amended consent provisions are operating and whether this accords with the intent of the reforms. The chapters also consider whether the cases could have been prosecuted differently, in a way that limits the juries' deliberations on consent only to those factors that are relevant to the legal notion of consent set out in the Code.

Chapter 5: Case Study 1

5.1 Introduction

Chapters 5, 6 and 7, which present the findings of the empirical research, are in many ways the core of this thesis. Collectively, the chapters critically appraise how the issue of consent is addressed in the trials in view of the new framework for consent that the amended provisions have established. These chapters demonstrate, with textual examples taken from the trial transcripts, how the evidence at trial is marshalled to establish the element of absence of consent, to create a reasonable doubt about that element or to exclude or establish the mistake defence. In this chapter the implications for the prosecution of sexual offences cases of constructing consent principally on the basis that the complainant manifested dissent are examined. The findings from two separate cases, Brennan's Case and Horne's Case, are discussed. It first briefly considers the historical understanding that a genuine victim resists to the utmost, as an aspect of the real rape stereotype. It then describes prosecution attempts to organise evidence of dissent into a convincing representation of non-consent based on this understanding. In both Brennan's Case and Horne's Case, the evidence of dissent was relatively weak and, in constructing absence of consent on this basis, the prosecution was confronted with the difficulty of establishing a sufficient quantum of dissent. Constructing the prosecution case in this way without regard to the new formulation of consent in the Code may allow prejudicial beliefs about women feigning reluctance to engage in sexual activity to generate doubt about whether the complainant's apparent unwillingness was genuine. The chapter concludes that, although evidence of dissent is probative of absence of consent, if it is not to be evaluated according to stereotypical views about rape, the evidence must be presented in the context of a positive consent standard.

Chapters 6 and 7 consider the way that evidence is used to construct absence of consent by relying on evidence of force or fear of force, and evidence of passivity or non-communication of consent, respectively. The discussion explains the difficulties inherent in prosecuting the cases on these bases and considers whether they could have been prosecuted differently in light of the new consent provisions. Regrettably, the research findings indicate that prosecutors continue to build cases according to the now outdated model of the pre-reform law and still appeal to discredited stereotypes regarding rape and sexual assault. These are the same stereotypes that earlier in this thesis were exposed as relics of a mediaeval view of the female sex. There are so few examples of legal officers attempting to engage with the reforms it is reasonable to conclude that they may not be fully aware of their implications and that further education about the purpose and

operation of the laws is needed. The findings do not suggest that the amendments to the consent provisions would necessarily have assisted the prosecution of the offences in all cases. Thus, they also confirm that it is ill-advised to rely solely on legislative reform to bring about fundamental changes in attitudes towards rape and sexual assault.

5.2 Manifestation of Dissent (Brennan and Horne)

Historically, proof of rape required that the complainant demonstrate the sincerity of her dissent by vigorously resisting her attacker.⁵¹⁰ Evidence of resistance by the complainant was adduced to demonstrate that force was used to procure her submission against her will.⁵¹¹ The resistance requirement proceeds from the presumption of consent that has animated understandings of female sexuality. Caringella describes the presumption as ‘[t]he notion that rape fulfils women’s fantasies to be conquered’.⁵¹² Others have explained the presumption on the basis of the underlying conception of sexual intercourse as something that is initiated by a man and is done to a woman. Passive female submission is the normative response and therefore, if a woman does not welcome the sexual advance, some resistance is expected. Strong resistance is necessary to demonstrate genuine absence of consent amounting to more than mere disinclination.⁵¹³ In order to rebut the presumption of consent in the sexual offences trial context, the victim had to demonstrate that she struggled with her assailant as hard as she could and maintained the struggle either until he was repulsed or her violation was complete. Inactivity or resistance short of this standard could be construed as consent.⁵¹⁴ Whilst resistance is no longer strictly de jure in many jurisdictions,⁵¹⁵ rape trials continue to be prosecuted by adducing evidence of manifest resistance to establish the element of

⁵¹⁰ The requirement was stated comparatively recently in historical terms, in *Morgan’s Case*. ‘The crime of rape consists in having unlawful sexual intercourse with a woman without her consent and by force ... It means that there has to be some violence used against the woman to overbear her will or that there has to be a threat of violence as a result of which her will is overborne.’: *DPP v Morgan* [1976] AC 182, 222 (Lord Edmund-Davies is here quoting from the trial judge’s summing up).

⁵¹¹ In chapter 2, the development of the resistance requirement is explained on the basis that, in a context in which non-marital sex was illegal per se, resistance to the utmost proved that the victim engaged in sex involuntarily. See chapter 2, 43 n 22.

⁵¹² Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) 64.

⁵¹³ See, eg, *ibid* 63–5; Ngaire Naffine, ‘Possession: Erotic Love in the Law of Rape’ (1994) 57(1) *Modern Law Review* 10; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 34–6; Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989).

⁵¹⁴ Caringella, above n 3, 65.

⁵¹⁵ And indeed in those jurisdictions, such as Tasmania, Victoria and Canada, where the legislative scheme endorses the principles of communicative sexuality, passivity instead now signals absence of consent.

absence of consent.⁵¹⁶ The results of this research bear that out. In 13 of the 19 trials in this study, as proof of absence of consent, the prosecution led evidence that the complainant had resisted the assault. The following cases exemplify the difficulties that arise where the prosecution relies on evidence of manifest resistance to construct absence of consent. In these two trials in particular, the prosecution attempts to make a case that the complainant offered strong resistance when the evidence does not necessarily disclose that this was what happened.

5.2.1 Brennan

In Brennan's Case absence of consent was argued principally on the basis that the complainant had clearly indicated to the accused that she did not want to engage in sexual activity with him. The difficulty for the prosecution in constructing their case on this footing was the highly contestable nature of the evidence on which they sought to rely. The evidence disclosed only weak efforts at resistance and the complainant's behaviour undermined her claim that she had resisted the accused. She did not deny that she had flirted with the accused earlier in the day, that she chose to remain alone with him downstairs after the others had gone to bed, and that, after some initial allegedly non-consensual sexual activity, she escaped to her own room only to go back downstairs at the accused's request where she was again assaulted. The prosecution could not ignore this evidence, even though it potentially weakened their case. Counsel should have tried to limit its negative impact by seeking from the complainant an explanation for her behaviour that would contradict any assertion by the defence that it amounted to evidence of consent or that it provided a basis for a mistaken belief in consent. However, the attempt to characterise the physical contact with the accused as affectionate rather than sexually provocative, and to suggest that the complainant had not singled Brennan out for particular attention, was unconvincing. Moreover, the manner in which the evidence was adduced in effect provided a foundation for the defence that the complainant had been the sexual aggressor. No suggestion was made that, in any case, none of the flirtatious behaviour amounted to evidence of free agreement to the specific sexual acts that occurred later that day:

Prosecution Counsel: Was there any sort of physical contact between you and Mr Brennan at the beach?

⁵¹⁶ See Louise Ellison and Vanessa E Munro, 'Jury Deliberation and Complainant Credibility in Rape Trials' in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 281, 285–6; Bernadette McSherry, 'Constructing Lack of Consent' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 30; Denise Lievore, Office of the Status of Women, *Prosecutorial Decisions in Adult Sexual Assault Cases* (2004) 14–16.

Complainant: He was sitting between my legs and I was playing with his hair.

Prosecution Counsel: And was there other physical contact between you that you recall?

Complainant: I probably, I think I gave him a hug.

Prosecution Counsel: Did you give anyone else a hug down the beach?

Complainant: Yeah. R and D.

There was evidence that the complainant had consumed a considerable amount of alcohol during the afternoon and the Crown argued that the accused had taken advantage of her inexperience and that he wilfully misinterpreted her earlier affection as a sexual come-on. In trying to make this point in cross-examination, prosecution counsel instead gave the accused an opportunity to detail once more all of the complainant's allegedly provocative acts:

Prosecution Counsel: [W]hat happened at the second hut, do you say?

Accused: There was a lot that actually happened at the second hut. There was, — she was sitting on my knee, she was, — she constantly, every time I moved, she would follow me to wherever I went, she would be cuddling me, kissing me on the neck, sitting on my knee every chance she could get, so I couldn't get up and actually get away from her, — just pretty much doing as she pleased with me.

Prosecution Counsel: What were you doing Mr Brennan?

Accused: A couple of times I got up and moved away, and—

Prosecution Counsel: A couple of times? Well you've got this girl, you who does youth work and cares about youths, you've got this girl sitting on your knee, cuddling you, kissing you, doing what she pleased with you, and all you did was get up a couple of times?

Accused: Yes.

Here, counsel suggests the possibility that there may have been another basis for absence of consent in this case, that the complainant may have complied with the accused's request for sex only because she was overawed by the situation. In such circumstances, there is no free agreement. However, in the fixation on manifest dissent, this alternative was not further developed. The evidence in the following exchange focuses solely on establishing that, once the physical contact became overtly sexual, the complainant repeatedly told the accused to leave her alone:

Complainant: He kept hugging me.

Prosecution Counsel: And what was your response to that?

Complainant: I told him, to go away.

...

Prosecution Counsel: And what was your response when Mr Brennan touched your breast?

Complainant: I told him to stop it.

...

Complainant: The second time, after R had left again he continued with rubbing my breasts and then I kept telling him not to and I kept trying to move away and then I was trying to get away just as R came in to the room.

...

Complainant: He started rubbing my breasts again.

Prosecution Counsel: Did you say anything?

Complainant: I told him not to.

Prosecution Counsel: Was anything else said at that point?

Complainant: I said to him, that I was sick of him touching me.

Prosecution Counsel: Mmh, and did you do anything at that point?

Complainant: I moved away.

However, the jury had to assess these refusals in the light of her earlier affectionate behaviour. Given the eventual outcome of the case, it seems that the jury had difficulty reconciling her previous complacency about physical contact with the accused with the Crown's claim that she actively resisted the sexual conduct that followed.

5.2.1.1 Sufficient Resistance

The difficulty for the prosecution in concentrating on evidence of manifest dissent rather than the absence of communicated agreement is that it inevitably invites consideration of what amounts to genuine or sufficient resistance as opposed to genuine or sufficient manifestation of agreement. The latter is the focus of the reforms. If a juror interprets female reluctance in the light of the rape fantasy script or the normative view of female responses to sexual approaches, then even the most spirited resistance may be insufficient to signal absence of consent. In the case at hand, the problem was particularly acute because the assaults occurred within earshot of the complainant's older brother yet she did not call to him for help. As an explanation, the prosecution suggested the complainant had continually tried to rebuff the accused's advances but her protestations had been muted because his physical strength and the force of his personality created an air of threat. The complainant stated that she was frightened both for her own and for her brother's safety. Her fears explained why she did not protest with sufficient vigour to rouse her brother (R) in the next room. When asked why she had not called for help the complainant responded:

Prosecution Counsel: Did you yell out?

Complainant: No.

Prosecution Counsel: Why was that?

Complainant: I was so scared.

Prosecution Counsel: What were you scared of?

Complainant: I was scared that he was going to hurt me more and that he was going to hurt R.

In cross-examination the complainant was unable to rebut convincingly the implication from defence counsel that the explanation for her passivity was inherently implausible. First, defence counsel questioned why she failed to call for help when her brother was awake in the room nearby:

Defence Counsel: Okay, but at that stage you'd been saying, stop it, hadn't you?

Complainant: Yes.

Defence Counsel: But quietly so you that you didn't disturb those next door?

Complainant: No I said it loud enough so he could hear it loud and clear.

Defence Counsel: Okay, no I'm not talking about he, Mr Brennan, I'm talking about those who were next door whose conversation you could hear. When you're saying, stop it get your hand off my breast, or whatever. Were you saying that quietly so only Mr Brennan could hear, or were you saying it loud enough, that you would expect someone in the next room to hear it?

Complainant: I was saying it at a normal, normal voice level.

Defence Counsel: Okay, and I take it that when your brother and Mr D were talking in the next room from what you could gauge from just listening to them, they appeared to be talking in a normal level for a private conversation about someone's sister?

Complainant: Yes.

Defence Counsel: Okay, so when you were saying, stop it, don't do that. It would be at least that loud wouldn't it, or?

Complainant: My voice is quieter than theirs, as seeing as they would be male.

Defence Counsel: Okay, well didn't you raise your voice at all just to hopefully let them know what on earth's going on out here?

Complainant: No.

Defence Counsel: And your brother comes out twice and comes into the room and didn't you say while your brother was there, 'look I think I might go up now, R'?

Complainant: I was scared.

Second, counsel questioned why, having retreated to the safety of her own bedroom she then complied with the accused's request to return to the room where she had just been sexually assaulted:

Defence Counsel: And you say that was because you were sitting out on the top step of the stairs upstairs and Mr Brennan was there, again trying to touch your breasts in a sexual kind of way and making inappropriate suggestions to you?

Complainant: Yes.

Defence Counsel: Is that right, sorry?

Complainant: Yes.

Defence Counsel: And in order to stop that, you agree to go from upstairs, back downstairs, down the outside steps into, and get back onto the bed that he was, need to be sleeping on that night, is that right?

Complainant: Yes because I thought it would, that it would stop him if I went, if I went back down there and I thought R, D like, was still awake.

Defence Counsel: Okay, and you knew that R and D could protect if you need to call out to them?

Complainant: Yes.

...

Complainant: Both of them, both of them together, not just one of them at a time.

Defence Counsel: No, okay, but that was your belief? That if you went down because they were there as, like security guards, for you? I don't mean that in a—

Complainant: They're like security blankets.

Defence Counsel: Yeah.

Complainant: 'Cause, I, yeah.

Defence Counsel: 'Cause if they were both there—

Complainant: If they were both there, awake, I knew that I'd—

Defence Counsel: You would be completely safe.

Complainant: That I'd be able to, like I'd, like—

Defence Counsel: Yeah. You'd be completely safe no matter what—?

Complainant: Because if they—

His Honour: Just let her finish Mr R.

Complainant: They could have come, like if they had have realised I was (inaudible) because they would have heard my voice or whatever, they would have come. Like, R would have kept coming in to check on me.

Defence Counsel (Resuming): But what I'm trying to have the jury understand is at least, whether it's right or it's wrong, at least in your mind, before you leave the

upstairs part of your house and journey down the outside stairs in your pyjamas in order to get back onto the bed you'd been sexually assaulted on earlier that night, your belief was 'if I yell out to my brother and his friend, and they're awake, they will be able to come and rescue me and I'll be safe'? Is that fair?

Complainant: That's fair.

Defence Counsel: Okay. Well how many times did you yell out to them?

Complainant: None.

The trial judge's summing up to the jury also betrays scepticism about the complainant's justification for returning to the downstairs room and lying back down on the bed with the accused:

His Honour: However, she also told you that when the accused came up and asked her to go back downstairs, she not only agreed to do so, but when she went downstairs she lay on the couch with the accused. Now she explained that on the basis that there was nowhere else for her to be in that room. It's a matter for you, but on the evidence of the witnesses there was ample room for the blow up chair that was in the room and she could well have sat on that, but that's a matter for you.

These extracts suggest that, even if she was not lying, at best the complainant was exaggerating about how earnestly she tried to avoid having sex with the accused. Accordingly, the jury were entitled to doubt that the encounter was non-consensual. Perhaps a more accurate and sensitive interpretation of the complainant's responses, however, is that she was young and inexperienced and was confused about what she wanted from the encounter with the accused. Her behaviour earlier in the day suggests that she was interested in him and desired some sort of physical contact, but her evidence also reveals that what may have started as an innocent tease escalated to a point where she lost control of the situation. With the almost exclusive focus on an evaluation of the sufficiency of her resistance this critical point seems to have been ignored.

5.2.1.2 An Alternative Approach?

Certainly, evidence of manifest dissent may be persuasive evidence of absence of consent, and the prosecution must address such evidence where it forms part of the factual scenario. However, if it is not presented in the context of a positive consent standard it may be evaluated by the jury according to stereotypical views about rape, in Brennan's Case that the complainant's efforts to resist were insincere. Here there was no evidence of force or injury, no corroboration from others present in the room next door and the actions of the complainant herself signalled that she felt some physical attraction to the accused. That evidence and the evidence of lack of sufficient resistance could be construed by the jurors as consent in the absence of a focus on positively communicated consent. This defeats the purpose of the reforms, that is, to avoid the problems in rape prosecutions of erroneous juror assumptions about what constitutes real rape and how a genuine victim behaves. Admittedly, Brennan may have been a difficult case to

prosecute. However, it was open to the jury to find at least that the complainant equivocated, that she was reluctant and that in such circumstances the accused should have sought clarification of her frame of mind. In this case too much was made of the relatively unconvincing evidence of manifestation of dissent and, in consequence, the inconsistency and improbability of much of the complainant's testimony proved fertile ground for the defence. The trial judge summed up these inconsistencies in the following passage:

His Honour: [I]t seems to me there are some contradictions in her evidence about resistance. On her evidence she was well able to say stop and tell the accused to stop right to the end, but on her —in explaining why she didn't she said that she tried to, in effect but physically was unable to call to R. In fact I should go to that aspect of her evidence, she said in terms of her failure to call out, that she was scared, that the accused was going to hurt her, or more, that he was going to hurt R and when cross examined about that she said that, she was taken to her evidence that she'd been squeaking the bed to try and wake R, and she was asked why she didn't call to R, and she said she tried, but nothing would come out. No matter how hard she tried, nothing, it didn't come out. She said, 'I tried to call out, but every time I tried to, the words would get stuck in my throat, because I was still crying and I was scared, and I couldn't physically get the words to come out', and the question: 'So it wasn't that you didn't yell out because you were afraid R was going to hurt, it was fear that stopped your voice from working, is that what you're saying', and her answer, 'I was scared that R was going to get hurt, as well as I just said that I was scared'. So in terms of what you might think was a contradiction there is a contradiction between her apparent ability to say stop, but her inability to call to R. Another contradiction you might think is, that she said that she tried to attract R's attention by shaking the back of the bed, but on the other hand she said that she didn't call to R because she was scared of the consequences for her, or him if she do so. She also said, and you might recall in her evidence that it wasn't as if the accused expressed any threat to her. Again in terms of her fears for R and the consequences of calling him, you might also recall that when R came into the room, without being called on two occasions, before she went up and got her pyjamas on, that had the impact on her evidence of immediately stopping the accused from endeavouring to rub or fondle her breasts. Also perhaps it's relevant that although she has told you that she very, she was frightened of involving R, in fact on her evidence immediately after her telephone call with MR in which she made a complaint to him, she in fact went downstairs and woke R and told him.

The reality in this case was that the evidence that the complainant actively resisted the accused was very weak. It seems that the complainant found it difficult to articulate her feelings of being out of her depth and overwhelmed by the situation and her inability to act. Consequently, there may have been a temptation to exaggerate her fear of violence and the extent of her dissent. The over-reliance by the Crown on manifestation of vocal and physical dissent and fear of the accused as the basis for the construction of absence of consent encouraged this exaggeration. However, it does not follow that, if she exaggerated some aspects of her evidence, she was necessarily untruthful in all of her claims. In particular, it does not follow that she lied about the non-consensual nature of the sexual encounter, though the trial judge's summing up may have invited the jury to reach just such a conclusion. Ultimately, the outcome of the case may have been an

example of ‘punishing the [complainant] for her forensic performance’.⁵¹⁷ As Kirby J explained in *Whisprun v Dixon*⁵¹⁸ instead of evaluating the objective evidence disclosed by the complainant’s testimony, the jury may have seized on the numerous inconsistencies in her evidence and concluded, impermissibly, that the whole of her testimony was unreliable.

Had the prosecution instead emphasised the centrality of the communicative standard and taken the opportunity in cross-examination to extract from the defendant an explanation of how the complainant had signalled that she consented to the sexual activity, it might have been more difficult for him to respond other than that she was being flirtatious down at the beach, that she chose to sit near him when they were back home, that she did not resist him very much and that she returned to the scene of the sexual assault. The last two propositions are not bases in law for a finding of free agreement and the first two provide flimsy evidence of free agreement to sex and establish nothing more than that she may have liked him and enjoyed his company. Instead, the accused was able simply to deny that she said no and to marshal the evidence of her equivocation as consent. The reforms, properly understood, should refocus the question to be answered in cases like this. The Crown could have constructed the case more forcefully and with greater clarity along the lines that the complainant was young and probably quite vulnerable and, although her failure to call out for help might be difficult to explain, it is nevertheless possibly understandable given her immaturity. They could have argued that the accused was a youth worker who should have understood her vulnerability and, in an apparent egregious breach of trust, exploited her lack of sophistication by buying alcohol for her and coercing her into sex. She may have been in awe of this older man, in fact overwhelmed by his age and strong personality, totally out of her depth, perhaps embarrassed and not knowing how to extricate herself from the situation.

The Crown failed to emphasise the mutual communication standard created by the reforms. The communication standard means that consent cannot be presumed in the absence of positive indications. It means that equivocation should prompt the other party to seek clarification of the existence of consent. Consequently, it also means that an accused cannot argue in his defence that he has no responsibility to check for the existence of free agreement. In a case such as this, where the evidence which is adduced in relation to the ingredient of absence of consent is equivocal, knowing that the onus of proof rests with the Crown, a jury may well doubt that the accused bears such a responsibility. But this is precisely what the positive communication standard entails

⁵¹⁷ *Whisprun Pty Ltd v Dixon* [2003] HCA 48 [122].

⁵¹⁸ *Ibid.*

since it denotes mutuality and reciprocity as the gauge of valid consent. If the evidence does not disclose affirmative indicia of consent, the failure of the accused to confirm the existence of consent also infringes the principles laid down in s 14A. The mistake defence will not succeed if the accused was reckless as to consent or did not take reasonable steps to confirm the existence of consent. Here, the accused was much more sexually experienced and sophisticated than the complainant and should have been responsive to any hint that the complainant was no longer consenting. The Crown could have explained the communicative standard set by s 2A(2)(a) with greater clarity and stressed that, in these particular circumstances, there was an even greater responsibility on the accused to ascertain the existence of consent than might be the case where the power imbalance is not so pronounced.

5.2.2 Horne

The case of Horne presents similar issues as Brennan's Case, due to the way that the prosecution constructed consent. Prosecution arguments emphasised evidence of dissent but this, again, was not a case where the complainant convincingly manifested dissent. The alleged rape occurred in the context of a first date between the complainant and the accused and the prospects of conviction depended, almost entirely, on the jury accepting beyond reasonable doubt the complainant's assertions that she told the accused she did not want to have sex with him. As in Brennan's Case, the victim's efforts at resistance were primarily verbal rather than physical and fell well short of 'resistance to the utmost'. The defence case was that the complainant welcomed the sexual activity. The jury were invited to draw unfavourable comparisons between the complainant's behaviour throughout the whole period of contact with the accused and the prototypical, risk-averse genuine victim. The defence position was that the complainant could have refused sexual activity if she had truly wished to do so. Since she failed to manifest credible resistance, and was apparently willing to put herself in harm's way by allowing a man she had never met before into her home, she effectively signalled her desire for sexual intercourse with the accused.

The questions posed in examination-in-chief reveal the thrust of the prosecution case. The complainant was led step-by-step through each stage of the encounter and asked to describe her responses to the accused's physical approaches, presumably to establish that she rebuffed him at every point. When he kissed her she responded, 'No, I do not like that.' When he put his hand under her shirt her response was, 'I said I do not want him to do that'. When he touched her groin she stated, 'I do not want sex.' The prosecution perhaps hoped that possible jury scepticism of purely verbal refusals might

somehow be overcome with reinforcement by repetition. However, if the jury doubted that she was genuinely reluctant, giving a plethora of examples of the different ways she said no was not likely to remove that doubt. The cross-examination of the accused explored the same territory using similarly repetitious questioning. The bulk of questions sought to determine whether or not the accused was aware of reluctance or resistance on the complainant's part:

Prosecution Counsel: Was she saying anything?

Accused: No, we weren't talking much, we were just trying to initiate sex there.

Prosecution Counsel: She wasn't complaining that you were hurting her?

Accused: Not at all.

Prosecution Counsel: She wasn't screaming?

Accused: Not at all.

Prosecution Counsel: She didn't flinch at all?

Accused: Not at all.

...

Prosecution Counsel: But she didn't tell you to stop or anything like that?

Accused: Not at any stage.

It is difficult to see how this type of questioning supported the prosecution case. Since, pursuant to the prosecution's theory of the case, absence of consent was equated with manifest dissent, the accused's answers, if accepted by the jury, directly undermined their case. Moreover, in a result that is clearly at odds with the way the consent provisions were intended to operate, they also justified his belief that she was consenting. The effect of framing absence of consent in terms of manifest dissent is that evidence of lack of resistance amounts to evidence of consent. If the prosecution had instead highlighted the positive consent standard as the primary focus for the jury's deliberations about absence of consent, questions about resistance would have at best assumed marginal importance. Counsel might have then asked the accused what conduct he relied on to show that the complainant was consenting, what steps he took to ascertain her consent or what reason he had for believing that she was willing to engage in sexual intercourse with a virtual stranger within 30 minutes of meeting him.

The defence focused on the complainant's apparently acquiescent behaviour:

Defence Counsel: When he put his arm around you I suggest to you that you didn't say to him, 'Don't do that', or pull away or anything like that?

Complainant: No, I was nervous.

Defence Counsel: But you didn't ask him to take his arm away, did you?

Complainant: No.

They compounded the potentially negative effect of the lack of evidence of physical resistance by emphasising that the complainant had allowed the accused into her home. According to the defence view, she did not have to let him in and an appropriately risk-averse woman would not have done so:

Defence Counsel: Now if you'd not wanted him to come inside you didn't have to open that door the second time, did you?

Complainant: No.

Counsel in effect invited the jury to conclude that there was a reasonable doubt that the complainant did not consent to sexual intercourse because she let a stranger into her house and did not resist his sexual overtures sufficiently vigorously. Again, had the case been run in accordance with the communicative standard embraced by the consent provisions in the Code, the jury might have accepted both these propositions but, given the absence of evidence of positively communicated consent, nevertheless still have no reasonable doubt about the element of absence of consent.

The reform of s 2A is not only about defining passivity or lack of resistance as evidence of absence of consent. It is also about redefining consent to sexual intercourse in terms of communicated free agreement. The existence of s 2A(2)(a) confronts the notion of implied consent and the myth that women enjoy being forced to submit to sexual intercourse. These are supplanted by a requirement that consent is communicated and that it is free and uncoerced. It is this that the construction of consent in terms of manifest dissent tends to overlook. As the basis of the prosecution case, evidence of resistance is easily discounted as being insufficient, contrived or exaggerated. Relying on dissent to establish absence of consent does not engage with the positive consent standard. In both these trials, amongst all the questions about dissent, there was virtually no consideration of the crucial questions, whether and how consent was communicated. Although the defence would argue that consent was communicated by a lack of dissent, this does not satisfy the standard of free agreement set by the Code. It arguably falls short of positive communication and supports the Crown allegation of absence of consent as defined in s 2A. The way was open in both trials for the Crown to build its case on the absence of communicated consent, as much as upon a manifestation of dissent, but it was an opportunity that the reforms have created that was not taken advantage of.

5.3 Conclusion

This chapter has examined the prosecution's reliance on evidence that the complainant communicated her reluctance to participate in sexual activity with the accused to construct absence of consent. It identified the difficulties that construction of the Crown case in this way poses for the successful prosecution of sexual offences cases and suggested that the new consent provisions offer alternative bases for prosecution that would avoid these problems. In the next chapter, the implications for constructing absence of consent on the basis of evidence of force or the fear of force are discussed. This was the second most common ground on which the Crown constructed absence of

consent. An expectation that a genuine rape episode is accompanied by evidence of force is a hallmark of the rape stereotype. As a signifier of real rape the force requirement is explained by a conviction that women are always sexually receptive but, out of consideration for socio-sexual norms, they feign reluctance and therefore evidence of a high degree of force is necessary to establish that the complainant was genuinely unwilling to engage in sexual activity. In constructing absence of consent on the basis of evidence of force the prosecution is confronted by the same obstacles as noted in this chapter, that is, establishing a sufficient quantum of force and addressing the belief that evidence of force may nevertheless be consistent with consensual sex. In chapter 2 it was argued that the force requirement may historically have been explained by the fact that, in making an allegation of rape, the victim was admitting the commission of a sexual offence. Evidence of force was therefore necessary to establish that the unlawful sexual conduct had been committed without her volition. This account no longer offers a convincing explanation for the requirement of force and research shows that in reality sexual violation is not inevitably accompanied by physical force.⁵¹⁹ Nevertheless, the findings in the following chapter reveal that evidence of force still plays a central role in trials of sexual offences.

⁵¹⁹ See, eg, Susan J Lea, Ursula Lanvers and Steve Shaw, 'Attrition in Rape Cases. Developing a Profile and Identifying Relevant Factors' (2003) 43(3) *British Journal of Criminology* 583, 591–2.

Chapter 6: Case Study 2

6.1 Introduction

Chapter 6 discusses prosecution efforts to construct absence of consent on the basis of evidence of force or the complainant's fear of force. As noted previously, force is a staple of the real rape scenario. Section 2A of the Code provides that consent is vitiated if procured by force or by a reasonable fear of force and thus retains explicitly this aspect of the rape stereotype. However, the reforms to s 2A were intended to expand the concept of rape to include circumstances where ostensible consent is compromised in other ways. Critically, the inclusion of a positive consent standard should facilitate the prosecution of marginal cases where the complainant's submission is procured without resorting to physical force or where the force used is apparently relatively minor. The findings of this research show, however, that evidence of force continues to be utilised by the Crown in accordance with the pre-reform conception of consent. Evidence of force is not marshalled around the concept of consent as free agreement so as to dispel the view that force can be compatible with free agreement. Whilst evidence of force may be highly probative of absence of consent, this chapter concludes that it can also be easily undermined by the defence and converted into an accepted aspect of consensual sex if it is not put to work within the framework of affirmative consent set out in the amended Code provisions.

6.2 Force or Fear of Force (Riley and Allen)

The construction of absence of consent primarily around the use of force as revealed by physical harm suffered by the complainant conforms to and plays upon common expectations that force and physical harm are requirements of real rape. It also adheres to a traditional pre-reform approach to the issue of consent. It can be said to be a pre-reform approach because the prosecution's evidence is intended to demonstrate that the complainant resisted, necessitating the application of force, rather than that there was an absence of communicated consent. Within the data set evidence of force and physical harm was a relatively common basis on which the Crown argued absence of consent. Such evidence was adduced by the prosecution in 12 of the 19 trials studied. Force is relevant to absence of consent and the Crown cannot ignore evidence that discloses it. However, construction of absence of consent solely on the basis of evidence of force is potentially problematic. First, the evidence that the complainant suffered injuries may be accepted by the jury as consistent with consensual sex as well as non-consensual sex. The

evidence may not be convincing, especially if it is used in the pre-reform way to show a lack of capacity to consent. Second, the evidence that the complainant was physically harmed may be highly subjective or inconclusive. For example, in the following extract from one of the trials, the exchange between prosecution counsel and their medical witness revealed that the evidence amounted to little more than the complainant's assertions that she felt sore and that certain areas on her body were tender:

Prosecution Counsel: Now you've recorded 'tenderness and tight muscles on the neck' could you just explain what you mean by that please?

Witness: The sides of the neck were tender when I examined them and the muscles were very tight, you could feel that the muscles were firmer than you'd expect.

Prosecution Counsel: And what would cause tight muscles?

Witness: Straining away or forcible movement of the neck, or someone pushing the neck — head down and she's trying to straighten her neck.

Prosecution Counsel: Thank you. And — so you could actually — when you felt the neck, actually could feel the tight muscles?

Witness: Yes.

Prosecution Counsel: What about the tenderness, how do you diagnose tenderness?

Witness: The tenderness, that she says that it's sore when I touch it.⁵²⁰

Examples like this suggest that the experience of Crown counsel is that juries will probably be influenced by stereotypical views of what constitutes rape, that they will expect to encounter evidence of force or physical injury and that in the absence of such evidence may be reluctant to convict. Therefore, the prosecution are constrained by juries' expectations to include as part of their case evidence of even relatively minor physical injury or to explain that lack of physical injury is not necessarily indicative of consent. For example, in the following extract from Brennan's Case, prosecution counsel sought confirmation from an expert medical witness that absence of injury could be consistent with forced intercourse:

Prosecution Counsel: Would one necessarily expect to see injuries if intercourse was non-consensual?

Witness: No.

Prosecution Counsel: Could you just tell us why that may be?

Witness: In my experience, the vaginal area is built to with, is extremely elastic and is built to withstand quite vigorous sexual intercourse and it's built to be part of the birth canal, so if the area can pass a baby head, which is a ten centimetre diameter on average, vigorous sexual intercourse would not cause much trauma to the area at all.

Depending on the facts, evidence of force may of course legitimately form part of the prosecution case but it should not be the sole basis upon which absence of consent is argued. Instead, it should be coupled with evidence that the complainant did not manifest her free agreement. So while the evidence in the extract from Brennan's Case above may have been useful to explain the absence of physical injury the prosecution failed to take the next step that seems to be required by the amended legislation. That is,

⁵²⁰ Horne's Case

they failed to marshal the evidence of force in support of the allegation of no communicated consent. The following cases demonstrate that the prosecution fail to convey the full legal conception of consent to the jury. They are typical of all the cases in the study in which evidence of force was adduced in that the evidence is used to show that the complainant was incapacitated due to the presence or threat of violence rather than to show a lack of communicated agreement. As explained in chapter 4, they are singled out for discussion because of their typicality and because of the richness of the textual examples that they contain which demonstrate how the arguments about consent played out in court. The use of evidence of force in this limited way fails both to debunk the myth that rape is always attended by physical injury, and to convey the idea that rape is sex without communicated consent, no matter whether there is physical injury or force.

6.2.1 Riley

6.2.1.1 Relationship Evidence

In Riley's Case we see how problematic evidence of force can be in the construction of non-consent, particularly when it is not linked strongly to a lack of evidence relating to free agreement either to the particular force or sexual contact in question. The parties in Riley's Case had been in a relationship for ten years although their association had been punctuated by periods of separation including stretches when the accused was in gaol. There was evidence of family violence and on several occasions the complainant had sought medical treatment for her injuries. It was common ground at trial that on one particular occasion she required nine stitches in her forehead as a result of being head-butted by the accused. There was also evidence that the complainant had reconciled with the accused following incidents in which he had seriously assaulted her. A lengthy voir dire was held prior to empanelling the jury in order to determine the admissibility of evidence of acts of violence committed by the accused against the complainant over the period of their intermittent relationship. This evidence included consideration of sexual aspects of the relationship. Leave to adduce the evidence was sought pursuant to the Tasmanian rape shield provision, s 194M of the *Evidence Act 2001*⁵²¹ and neither party

⁵²¹ Generally, since the enactment of so-called rape shield legislation in various Australian and international jurisdictions, evidence of past sexual experience is prima facie inadmissible in trials of sexual offences. There are exceptions to this general prohibition however, and in Tasmania the admissibility of evidence of sexual experience is governed by s 194M of the *Evidence Act 2001* (Tas). Section 194M provides in part:

(1) In proceedings before a magistrate or court relating to a crime charged under Chapter XIV or Chapter XX of the Criminal Code or any offence under section 35(3) of the *Police Offences Act 1935*, including proceedings for the sentencing of the defendant, any evidence that discloses or implies –

objected to the reception of the evidence of past sexual behaviour. Neither did the complainant claim to suffer any distress, humiliation or embarrassment at having the evidence aired in court.

The prosecution argued that the historic violence was relevant to the issue of consent since it explained why the complainant agreed to accompany the accused, why she had reason to fear him and why she therefore passively submitted to the sexual acts:

Prosecution Counsel: So he asked you to take your clothes off, is there any discussion prior to that at all about what is to happen or not to happen?

Complainant: I don't remember.

Prosecution: So is the order that you come out of the toilet, come into the lounge room and then you're asked to take your clothes off?

Complainant: Yes.

Prosecution: Do you do that?

Complainant: Yes.

Prosecution Counsel: Why do you do that?

Complainant: Because I was scared not to.

Prosecution Counsel: Scared of what?

Complainant: Of what would happen if I didn't.

Prosecution Counsel: What did you think would happen if you didn't?

Complainant: Nathan would get angry.

Note that this extract also reveals a rudimentary attempt by counsel to engage the communicative consent standard by asking whether there was any discussion about the proposed sexual conduct. That counsel understood the ramifications of s 2A(2)(a) is later confirmed by the tenor of questions put in cross-examination of the accused and in legal argument about the content of the trial judge's summing up to the jury (see discussion below). Here, counsel might have grasped the opportunity to emphasise the significance of s 2A(2)(a) even further by exploring whether the complainant indicated free agreement at any time or whether she considered the question of her consent irrelevant. It may have been that she believed that the accused would have sex with her regardless of what she communicated to him about her wishes.

The defence conceded that the relationship had been a violent one, but they argued that the violence was sometimes initiated by the complainant:

...

- (b) the sexual experience of that person, other than sexual experience which forms part of the events or circumstances out of which the charge arises, must not be adduced or elicited unless leave of the magistrate or judge is first obtained on application made in the absence of any jury.
- (2) A magistrate or judge must not grant leave unless satisfied that –
 - (a) the evidence sought to be adduced or elicited has direct and substantial relevance to a fact or matter in issue; and
 - (b) the probative value of that evidence outweighs any distress, humiliation or embarrassment which the person against whom the crime or offence is alleged to have been committed might suffer as a result of the admission of that evidence.

Defence Counsel: The third relevant thing that the defence can concede is that their relationship did, indeed, have its ups and downs and I won't cover it, Mr R quite pointedly calls it violence, it was, there are lots of physical confrontations between these two parties, there is absolutely no doubt about that and the defence can indicate to you right off the bat that, that, in fact, happened as well.

...

Defence Counsel: So what the defence says is that it's very important that you focus on in relation to this context issue, who initiated all this violence. Mr R has already made some admissions at the outset that it wasn't just Mr Riley, Miss M herself on a number of occasions initiated this violence so you needn't start off thinking that this has all been perpetrated by Mr Riley, the evidence will indicate to you that's not the case at all.

Contrary to the prosecution position however, defence counsel argued that the evidence of violence supported the claim that the specific sexual acts charged were in fact consensual. Counsel suggested that, since the complainant had herself initiated reconciliations during the course of their relationship, fear of the accused did not play a part in her acquiescence to the sexual conduct:

Defence Counsel: You say that the relationship between yourself and Mr Riley commenced about 1997?

Complainant: Yes.

Defence Counsel: And your evidence as I recall it was on again, off again, correct?

Complainant: Yes.

Defence Counsel: Now presumably the times that it's been off there's been some kind of reconciliation, it started up again, correct?

Complainant: Yes.

Defence Counsel: And it's true isn't it that on a number of those occasions the reconciliation's been initiated by you?

Complainant: Yes.

Defence Counsel: So on those occasions you've simply wanted to get back into the relationship?

Complainant: Yes.

Defence Counsel: And that's been consensual?

Complainant: Yes.

Defence Counsel: Those decisions, and he hasn't threatened you with force in order for you to get back with him, you've done that by consent?

Complainant: Yes.

Defence Counsel: And it's true isn't it, Mr R's taken you through this, that that's been the case even after the acts of violence, that you've been led through fairly laboriously?

Complainant: Yes.

Defence Counsel: So even after those acts of violence, if I could be clear, it's the case that the reconciliation, your attempts at reconciliation have been by consent?

Complainant: Yes.

Although it may be said that, in formally addressing the admissibility of relationship and sexual history evidence, the court in Riley adopted the correct approach to such evidence, the difficulty remains that, by focusing on evidence about the nature of their past relationship, the central issue, whether consent was communicated at the time of the particular incidents, is overlooked. The prosecution was unable to satisfy the jury in relation to absence of consent because the defence had led evidence that cast doubt on the complainant's claim that she was fearful of the accused. Even though the complainant

presented as a credible witness, even though there was objective evidence of the violence that she had encountered at the hands of the defendant and even though the alleged rapes occurred in the threatening context of an abduction, the accused was acquitted. This suggests, perhaps, that juries are able to compartmentalise evidence of force. Even where the evidence is accepted, it is quarantined from the jury's consideration of the question of consent. The result is that, as in this case, the jury may believe that the complainant was physically assaulted or at least genuinely fearful that she would be, and at the same time accept that she nevertheless freely consented to sexual intercourse.⁵²²

Constructing absence of consent around the fear of force requires that the jury make a judgment about how fearful she was. In order to convict, they must be convinced that her fear was sufficiently incapacitating. Had the prosecution also emphasised the communicative standard in s 2A, the question of whether she was genuinely fearful or not would assume much less importance. Instead, the critical consideration for the jury would be whether or not the Crown had persuaded them that there was no evidence of positive acts that communicated free agreement to the sexual conduct. Entertaining a reasonable doubt that the complainant was genuinely fearful is not sufficient under the terms of s 2A(2)(a) as the basis for an acquittal. The jury must also have a reasonable doubt about the communication of consent. In order to convict they must be satisfied beyond reasonable doubt that she did not manifest genuine free agreement. Evidence of force and previous violent episodes might be relevant to that question because they show that communication of her desires was fruitless. However, here the jury were not given the opportunity to assess the question of positive consent. Instead they were only prompted to assess whether the quantum of force was such as to vitiate consent.

6.2.1.2 Construction of s 2A

Of even greater concern in Riley's Case were comments of the trial judge to the jury in relation to the definition of consent in the Code. In summing up his Honour began by outlining the notion of consent as it was formerly drafted:

His Honour: What's consent mean? Well, we can start off — well it means consent is freely given by a rational and sober person who is placed, not put under circumstances, but is placed so situated that they are able to form a rational opinion upon the matter to which the consent is given. So it involves a person who's rational, not totally disorganised. It obviously wouldn't involve, for the purpose of this, someone sort of totally mentally disabled and has no idea of what's going on, but that's not in issue here. But it means the giving of a rational and sober person [sic] who is in a position to be able to form a rational opinion of what they're doing, what they're consenting to.

⁵²² On this point see Terese Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press, 2000) 66–7, 134–5.

His Honour's explanation of the legal notion of consent was simply wrong, drawing as it did on the pre-amendment legislative provision. It was also completely irrelevant to the case at hand. It was never suggested that the complainant was anything but sober and rational. Moreover, in emphasising the issue of capacity, he may have given the jury the impression that absence of consent requires incapacity to consent. Continuing his summing up, he appeared to suggest that the amendments to s 2A were intended to operate merely as an extension to the previous concept of consent:

His Honour: And I started by saying rational, sober person, positioned or in a position of, able to form a rational opinion upon the matter. Well Parliament has now said, 'now we'll tell you how you approach that'.

His Honour had seemingly not grasped that the reforms were intended to overhaul the existing law in relation to consent in sexual offences cases and it may be that his self-acknowledged difficulty in understanding the meaning of the amended provision (see below) arose from his attempts to fit the new definition, with its communication standard, into the framework of the old provision. The amendments were designed to direct the court's focus to the existence of mutual and free agreement but his Honour's comments implied that the question of capacity remains central to the jury's assessment of the evidence. Clearly this was not Parliament's intention. In delivering the second reading speech of the Criminal Code Amendment (Consent) Bill 2003 the Attorney-General stated, that as a result of the amendments, 'absence of consent is not limited to cases where rational choice is impossible but is extended to circumstances where choice is affected in other ways.'⁵²³

6.2.1.3 Positive Communication of Consent

The error was further compounded by his Honour's ruling on argument about the operation of s 2A(2)(a) in the course of the trial. Section 2A(2)(a) states:

(2) Without limiting the meaning of "free agreement", and without limiting what may constitute "free agreement" or "not free agreement", a person does not freely agree to an act if the person —
(a) does not say or do anything to communicate consent;

The debate about the correct interpretation of s 2A(2)(a) arose from the defence contention that the section does not require that consent be positively conveyed. The gist of prosecution cross-examination of the accused was that s 2A(2)(a) should be construed (correctly I would contend) as requiring evidence of affirmative communication of consent to the particular sexual conduct in question. In questions put to the accused,

⁵²³ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

counsel repeatedly emphasised that the complainant did not positively convey her consent:

Prosecution Counsel: Do you agree that she performs oral sex on you at this point?

Accused: Yes.

Prosecution Counsel: Is there anything said that leads to that?

Accused: No.

Prosecution Counsel: It just starts happening does it?

Accused: Yes.

...

Prosecution Counsel: I want to suggest to you to cover this completely that with respect to the oral intercourse and the two episodes of vaginal intercourse that S made it clear to you that she wasn't consenting at that time?

Accused: No, she didn't.

Prosecution Counsel: Now it's correct, isn't it, that you essentially are saying well I thought she was consenting?

Accused: Well it was the same as any other time we had sex so—

Prosecution Counsel: Right, okay. That's your logic, is it? That it was similar to other times that we'd had sex so you didn't see anything unusual in it?

Accused: Well if she didn't want to have sex she would have said.

Prosecution Counsel: Right and you'd had sexual intercourse I think on the Monday, hadn't you, in relation — at the same place. Is that right?

Accused: Yes.

Prosecution Counsel: Right. So is your logic because she consented on the Monday, she was consenting on the Friday? Is that the logic you're using?

Accused: No.

Prosecution Counsel: Right. I just wanted to check that. You really didn't care whether she was consenting or not, did you?

Accused: Yes. If she didn't want to have sex, we wouldn't have had it.

In the course of cross-examination counsel also attempted to forestall reliance by the defence on s 14A, mistaken belief in consent, by extracting an admission from the accused that he had not taken any steps to establish positively that the complainant gave her consent. The allusion to the specific terms of s 14A is clear in the following extract:

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Prosecution Counsel: You didn't take any steps to understand that in an affirmative sense. That is, you didn't say to her, look are you happy with this?

Accused: I can't understand—

Prosecution Counsel: You just didn't ask her about it, did you? It just started happening, did it?

Accused: Yes, it started happening.

In addressing the jury, initially his Honour's approach to s 2A seemed to accord with the construction placed on it by prosecution counsel. He stated unambiguously that s 2A required affirmative communication of consent:

⁵²⁴ Section 14A reads:

(1) In proceedings for an offence against section 124, 125B, 127, 127A or 185, a mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused —

...

(c) did not take *reasonable steps*, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act (emphasis added).

His Honour: Parliament has intervened and says, ‘there you are, the person doesn’t have to fight, struggle, do or say something’. In fact, they’ve really got to do it the other way, communicate consent or say or do something which communicates consent.

However, this interpretation of the section did not survive the defence challenge that followed. The defence objected to his Honour’s direction that consent be positively communicated:

Defence Counsel: I’m formally seeking that you do re-direct in relation to a couple of matters. ... But my application is this, that yesterday and I don’t have the benefit of the transcript, your Honour, in relation to the Closing and Summing Up, but yesterday it was my view that the jury may have been left with the impression that he was required to stop, consider the physical act, and receive some positive affirmation from the complainant in order for that to be consent, and your Honour used the terms that — you’ve actually used the concept of her saying yes.

In putting their case, counsel argued first that there is no requirement of affirmative communication of consent in the legislation and second that, given the absence of such a requirement in s 2A, a mistaken belief in consent may be based on evidence that does not amount to a positive communication of consent. In this case, counsel argued that the long history of their relationship was a sufficient basis for a reasonable belief that the complainant was consenting:

Defence Counsel: My submission in relation to that is that the circumstances known to him are essentially a relationship of some nine years standing. The acts from May 19 through to July 21 it’s been consensual sex etcetera etcetera, and that sub-section again doesn’t require that he seek any positive affirmation. So it’s the same point, but it’s relevant to both 2A and 14A(1)(c). The circumstances known to him were such that he didn’t need to, as you might if you hadn’t known the lady previously, go into far more detail about a request of a sexual intercourse than you would if it’s a normal sexual relationship. And if you’re married to your partner, ‘I don’t go home every night and have her sign a contract or go through a lengthy dissertation about whether she’s consenting to sexual intercourse, because in the circumstances known to me I’m in a relationship with her, the usual course of our sexual intercourse is that I climb into bed, I don’t have to have her say yes, I don’t have to take any real positive steps about that other than to give her a cuddle’, something like that. But I don’t expect you to say this to the jury, but what I’m saying is that it’s not under s 14A(1)(c) a requirement for positive affirmation or positive steps under that sub-section either.

His Honour considered the section and, in a retreat from his earlier direction, conceded that the section did not require positive communication of consent.

His Honour: That’s precisely the problem. It seems to do two things, you see, and it’s hard to read.

Defence Counsel: Well with respect, your Honour —

His Honour: Just let — don’t ‘with respect’. Just let me finish please.

2 A: Without limiting the meaning and without limiting what may constitute free agreement or (quote) not free agreement:

A person does not freely agree to an act if the person does not say or do anything to communicate consent.

Defence Counsel: I can understand that.

His Honour: I don’t — well, if you do you’re doing quite well.

Does not consent –

Defence Counsel: Well I'm in a position to make some submissions then.

His Honour: Yes. No, no, I understand that. Just slow down. And I'm saying, what can you say it does mean?

Without limiting what may constitute free agreement -

In other words, without limiting the term, and then:

- or not free agreement, a person does not freely agree if the person does not say or do anything to communicate consent.

Now here, it would seem that she did not say or do anything to communicate consent.

Defence Counsel: I disagree.

His Honour: Well, yes. No, I understand that and, in fact, what I've done to the jury is give them two meanings for that one. And the other, in other words, the fact that you don't communicate or show some positive sign does not negate free consent, or does not mean that there is no free consent. And the problem is caused by free agreement and not free agreement. I'm happy, though, to re-direct and let the Crown — let the State appeal that point, and I'll rule in favour of the Defence. You see how it can have two meanings. One —

Defence Counsel: I can indeed but I —

His Honour: The fact that she didn't say no or fail to have struggled does not negate or can nevertheless mean that she did not give free agreement. That's the point that okay. And it can also mean that Parliament's tried to say the fact that she does not say or do anything to communicate consent turns it on its head and says that there's got to be some positive indication that she's consented. I mean, that's what the debate was about how that came into being, and all I'm saying is you should have — we should have had this out earlier ... But at any rate, I follow your point. Yes, go on, next one.

Defence Counsel: Well my point, your Honour, is that it doesn't create a positive obligation.

His Honour: I understand that. I said I follow your point.

In stating that the absence of positive signs of consent does not negate consent his Honour gave s 2A(2)(a) the exact opposite meaning both to the one intended and the only one that is available on a correct construction of the provision. That is, the absence of positive signs of consent equates to absence of consent. This erroneous construction of the provision went unchallenged, as, despite previously placing a different construction on the section, the prosecution was not then prepared to contest the point. The summing up continued as if the Crown had conceded that s 2A does not require affirmative communication of consent. In fact the Crown did not concede this. The Crown position was that silence does not amount to free agreement but that equally, the provision does not require verbal communication of consent:

Prosecution Counsel: Our position is that well it essentially you're saying is if you do nothing or say nothing, it doesn't mean or doesn't necessarily follow that you're consenting.

...

Prosecution Counsel: If it please, I don't have any difficulty with the proposition that there doesn't have to be necessarily a verbal indication of yes.

No objection can be taken to this since it is entirely consistent with the terms of s 2A.

But, in adopting this construction it did not follow that the Crown had also conceded that a male in a relationship, in the absence of verbal confirmation, can assume that his

partner is consenting, solely on the basis that she consented in the past. The Crown had agreed that communication of consent need not be accomplished verbally, not that there is no requirement that consent be affirmatively communicated in any guise.

6.2.1.4 An Alternative Approach?

In arguing the case for the defence, counsel sought to apply to these atypical circumstances, the same standards of sexual communication as those which might be appropriate to a normal, healthy sexual relationship.

Defence Counsel: The circumstances known to him were such that he didn't need to, as you might if you hadn't known the lady previously, go into far more detail about a request of a sexual intercourse than you would if it's a normal sexual relationship. And if you're married to your partner, 'I don't go home every night and have her sign a contract or go through a lengthy dissertation about whether she's consenting to sexual intercourse, because in the circumstances known to me I'm in a relationship with her, the usual course of our sexual intercourse is that I climb into bed, I don't have to have her say yes, I don't have to take any real positive steps about that other than to give her a cuddle'.

This submission was approved by his Honour:

Defence Counsel: What I'm saying is that that's, in fact, correct that the events of May 19 onwards do establish a context and they create, in the circumstances known to him, no need for any positive affirmation or request to say yes, because the circumstances are that they're in a relationship. They've had sex twenty plus times even on her evidence, and it creates circumstances known to him that don't require a positive affirmation if it's the same way that it always has been. Well just like the example, the poor example I used about being married, it's not the case that every time you want to have sex with your wife that you ask her and she says yes, but it doesn't create a positive — an obligation for a positive affirmation if, in the circumstances known to him, they're in a relationship, they're in a sexual relationship, they've had consensual sexual intercourse for two months.

His Honour: I thought this was what you told the jury.

Defence Counsel: That it doesn't require —

His Honour: I thought that's what you told the jury. *That's how you conducted your case quite properly so* (emphasis added).

Defence Counsel: Indeed.

The exchange shows that, instead of addressing the issue of consent in a criminal context, the parties were drawing analogies with the domestic understanding of consent. Yet the critical distinction in Riley's Case was that the events occurred in the context of a seriously dysfunctional relationship. The inescapable fact is that in a healthy, non-violent and non-coercive relationship, there will routinely be no verbal confirmation of consent although consent may be communicated by objectively ambiguous actions that both parties nevertheless recognise as indicia of agreement. Even in such relationships consent cannot be presumed but is always subject to negotiation and re-negotiation, however it may be that couples dispense with the need for affirmative consent precisely because of the mutual trust that is developed over the course of a long-term relationship. This is not

to suggest that the positive consent standard does not apply, rather it is a recognition that consent in such relationships may be communicated by a pattern of conduct. Depending on the context, there may be an evidential issue about what sort of conduct is sufficient to satisfy the communication standard but there is no legal distinction made between different types of relationships. In uncontested sexual encounters, engaging in sex in the absence of unambiguously communicated consent does not give rise to allegations of rape. However, this was a relationship that had been characterised by a considerable degree of violence and intimidation. The accused had been in the habit of appropriating his partner's goods for himself and had acted towards her in the same possessory way. In this context, the accused should not have been given the benefit of the mistake of fact defence solely on the strength of his assertion that this was the course their sexual relations had always taken. In the words of Helper JA in the Canadian case of *R v Malcolm*,⁵²⁵ in this case, 'the circumstances preceding the sexual activity call out for the accused to take positive steps to assure himself that the complainant is knowingly consenting to that activity'.⁵²⁶ Just how active the enquiry should be will depend on the circumstances of the case. In situations where objective evidence of violence and intimidation raises a question about why the woman would want to have sex, the accused has an even greater responsibility to ensure that his partner is freely agreeing to the sexual conduct.

This was a clear instance where the requirement that consent was affirmatively communicated should have been insisted on. It was incumbent upon prosecution counsel and the trial judge to address the jury in those terms and the defence should not have been permitted to rely on the fact of their past fractured relationship as a basis on which to infer consent. If communicated consent had been flagged as the primary jury consideration, the evidence of force or threatened use of force and the complainant's fearfulness could have been appropriately marshalled around the issue of absence of communication. However, apart from the few comments that impliedly reference s 2A(2)(a), the prosecution case was not run on the basis of the absence of evidence of affirmative consent and, in light of the trial judge's rulings, it is doubtful whether the outcome would have been different even if the Crown case had been conducted in that way. In a clear demonstration of the limitations of black letter law reform noted in the introduction to chapter 5 this case shows how the aims of reform can be thwarted by the obstructionist approach of both judge and counsel in their failure to acknowledge the fundamental shift in understanding that the reforms require.

⁵²⁵ (2000) 148 Man R (2d) 143 (CA).

⁵²⁶ Ibid para 36.

6.2.2 Allen

Allen's Case was heard in the Supreme Court some twelve months before Riley. It is another case involving rape by an allegedly violent former partner. This case bears all the hallmarks of the pre-reform conception of non-consent primarily as a lack of freely given consent, where acquiescence is procured by force, evidenced by physical injury. This approach fails to marshal the evidence of force or physical injury around what should now be the central question, whether there was genuinely communicated, genuinely free agreement. It also displays the weaknesses of the pre-reform reliance on evidence of physical force identified in Henning's report, in particular the findings that, even where they are supported by strong evidence of physical violence, assertions of absence of consent can be defeated by claims that injuries sustained by the complainant were consistent with consensual sexual contact or that the accused mistakenly believed she was consenting, because at the time of the offending conduct she failed to manifest her dissent.⁵²⁷

6.2.2.1 Relationship Evidence

In Allen's Case the Crown argued both that the complainant was forcefully violated and also that, having experienced his violent nature in the past she submitted to intercourse on the occasion in question because she had learned that resistance was futile. The dual purpose of this evidence is exemplified in the following exchanges. First, the complainant's assertions about the violence of the specific incidents were supported by the testimony of other witnesses. An expert medical witness recounted the injuries she noted when she examined the complainant the day after the events that gave rise to the assault count and the second count of rape:

Witness: [T]he lady in question had a number of bruises present in various areas of her body. According to my notes she had a fairly large fresh bruise on the left forehead which I thought was less than twenty-four hours old, it was still red and raised and just starting to change colour to blue. She had another such bruise behind the right ear and a swelling above the right ear. She had a swelling that had not yet changed colour on the left upper neck. She had scratch marks on the right breast which had penetrated the skin. She also had bruises on the buttocks, mainly on the left side and I also thought they were fairly fresh within twenty-four hours. She had some grazes on the lower legs which I thought were probably older. She also had some tenderness over the left thigh, but I've made a comment that there were no bruises present.

Prosecution Counsel: Did you examine the female genitalia?

⁵²⁷ Henning refers to a case in which the complainant had sustained injuries as a result of jumping from a moving vehicle in an attempt to escape from the accused. The accused argued that sexual intercourse, which occurred after the attempted escape, was consensual since by that time his violent behaviour had ceased. Although the accused was convicted on two counts of aggravated assault the jury was unable to reach a verdict on two other counts of rape: Henning, above n 3.

Witness: I did, yes. And I found she was quite tender, especially on the left side of the vulva, which is the perineum, this is the area between the vagina and the thigh and there was some swelling there but no actual bruising at that stage.

The complainant's daughter testified in relation to the same incidents that her mother came home with bruises on her arms:

Prosecution Counsel: Do you remember another time later in that month when you saw your mother and she was upset?

Witness: Yep.

Prosecution Counsel: Can you tell us about that please?

Witness: Yes, well, I was up late watching television and my little brothers were in bed and Mum left about nine thirty that night and she was supposed to be staying at Rob's, I was still watching TV and Mum let herself in and then I asked her why she was crying and she also had marks down her arms.

Prosecution Counsel: Yes, what sort of marks?

Witness: And she said, like bruises sort of thing.

The accused himself also conceded in cross-examination that their relationship had been characterised by sexual violence and that on the occasion giving rise to the second count of rape the sex had been 'rough':

Prosecution Counsel: So you had sexual intercourse at 2.30ish around the afternoon — that she later came back that night, and there was, as you say, sexual intercourse again around midnight.

Accused: Oh, probably earlier than that.

Prosecution Counsel: Was it rough?

Accused: It's always been rough.

In alluding to the previous sexual relationship, the accused gave counsel the opportunity to explore the nature of that relationship, shifting the focus of the cross-examination to former episodes of violence:⁵²⁸

Prosecution Counsel: Always rough. Tell us what you would do to each other in this rough sex...

Accused: Pull hair, bite —

Prosecution Counsel: Right. She'd pull your hair...

Accused: Yeah.

Prosecution Counsel: You'd pull her hair...

Accused: Yes.

Prosecution Counsel: Pull out clumps, would you?

Accused: Oh, I don't think it would go that far.

...

⁵²⁸ In Allen's Case prosecution counsel did not seek to adduce evidence relating to the sexual experience of the complainant but was drawn into pursuing that line of enquiry in response to the accused's answers given in cross-examination. It is difficult to explain why prosecution counsel trespassed into this area, first because in so doing the defence's main argument (that the complainant suffered injuries in the course of rough but consensual sex) benefited from a re-arranging and second because leave was not sought as required by s 194M. In any case, had leave been sought, it seems unlikely that the requirements of s 194M could have been made out. Sub-section (1)(b) requires that leave be sought unless the evidence arises directly from the events which gave rise to the charge. Such was not the case here. In addition, in accordance with ss (2)(a) leave must not be granted unless the evidence bears 'direct and substantial relevance' to a fact in issue. The fact in issue here was whether or not the complainant consented to sex on a particular occasion.

Prosecution Counsel: Was it normal for her hair to fall out when you pulled it.
Accused: Yeah.
Prosecution Counsel: In clumps.
Accused: Oh, not clumps — but there'd be hair.
Prosecution Counsel: How many hairs.
Accused: I never really counted them, Mr S.
Prosecution Counsel: Was it a handful? Or was it just a few?
Accused: I never really noticed. We weren't really worried about stuff like that.
Prosecution Counsel: Did your — you weren't worried about hairs coming out.
Accused: Well, we were more interested in pleasing each other, I suppose.
Prosecution Counsel: You used to nibble her ear.
Accused: Yeah, a lot.
Prosecution Counsel: Bite her ear.
Accused: A lot.

Presumably, in pursuing this secondary use of evidence of force, prosecution counsel hoped to show the jury that Allen was a very violent man and that the complainant's submission did not amount to free agreement but was rather an act of self-preservation. However, if this was the prosecution's intention, it was undermined by the defence argument that the complainant generally enjoyed rough sex and the implication that she therefore consented to the violent sexual acts that were the subject of the charges:

Prosecution Counsel: Did you feel that when you were having sex with M J — rough, as you put it — that she would ever be in pain from what you were doing.
Accused: I wouldn't have thought she would have been. I mean, a little — being rougher is what she likes, and what I like.

The defence argument can only succeed if it is assumed that past behaviour is an accurate predictor of future conduct. This assumption posits that, having once consented to violent sexual conduct with the accused it is justifiable to conclude that the complainant gives consent to any subsequent instances of sexual violence, regardless of her claims that she did not in fact do so. In effect, this sort of sophism entails the conclusion that it is not possible to rape a woman who enjoys consensual rough sex. The prosecution was exposed to this counter argument precisely because it permitted, and even encouraged the focus of questioning to stray from its proper target, that is, the complainant's state of mind in relation to the specific sexual acts that formed the basis of the charges, rather than what she may or may not have agreed to in the past. However the prior sexual relations may be categorised, the salient feature about them was that they were consensual and thus fundamentally different from the current acts. Counsel might have neutralised the defence argument that consent could be predicated on past behaviour by highlighting this fundamental distinction.

6.2.2.2 Sufficient Force

Quite apart from the issue of the admissibility of the evidence of past sexual history, prosecution counsel did not focus on the alleged rapes and ask the accused to explain

why he argued that the sexual conduct was consensual. Instead, counsel responded to the defendant's claim that violence was not probative of absence of consent by suggesting that, even given that they enjoyed aggressive sexual relations, on this occasion the degree of force used was excessive:

Prosecution Counsel: Do you call pulling someone's hair out of their head rough?

Accused: I never pulled any of her hair out.

Prosecution Counsel: Would you call hitting her head five times with a clenched fist rough?

Accused: I never hit her head with my fist.

In accordance with the amended legislation counsel might also have probed whether the accused made any independent assessment of the complainant's consent to his conduct at the time in question or whether he just assumed it. The accused's reliance on past allegedly consensual violent sexual behaviour might have been nullified (and even turned against him) by reference to the fact that the complainant had left him and taken out a restraint order. It might then have been suggested in cross-examination that these circumstances should reasonably have prompted him to take particular care to ascertain the existence of consent on the occasion in question rather than just assume it. Instead, rather than focussing on whether the complainant manifested consent to the sexual conduct or what steps the accused had taken to determine that she was consenting, the issue of the degree of force used to procure submission assumed primary importance in witness examination and cross-examination. It is not maintained here that a change in focus of this nature would necessarily have produced a different outcome in this case. But it is argued that the amendments were effectively subverted by lack of their application and were not given an opportunity to produce a different outcome.

Notwithstanding the apparent importance of physical injury for the prosecution case, the present case shows that evidence of even quite serious harm may not of itself be sufficient to secure a conviction. In Allen's Case there was objective evidence of physical injury to support the prosecution case —scratches, bruising, grazes, swelling and patches of hair loss. In addition, the accused did not deny that he had sex with the complainant, nor did he deny that it involved elements of violence such as biting and hair pulling. There was, moreover, a restraint order in force at the time of the offences that attested to the history of his violence towards her. Nevertheless, the accused was acquitted on all counts. Even faced with the totality of the evidence of violence and aggression, presumably the jury did not accept either of the prosecution arguments: that the complainant had been physically overpowered and raped by the accused; or that alternatively, given the history of their relationship and the complainant's knowledge of the accused's violent nature, she had provided only token resistance for fear of provoking him.

6.2.2.3 Sexual History

As noted above, defence counsel exploited evidence of the pre-existing relationship to represent the complainant as a woman who enjoyed rough sex and to defeat her allegations of rape on the occasions at hand. Unlike Riley's Case, where leave was sought as required under s 194M of the *Evidence Act 2001*, such evidence was adduced without comment from either opposing counsel or the trial judge. In cross-examination of the complainant, counsel was given free rein to ask questions about the nature of their sexual relations without reference to, and without objection from, either opposing counsel or the presiding judge.

Defence Counsel: I want to suggest to you that the intercourse that you and Mr Allen had, like generally in your relationship, was quite physical?

Complainant: It was.

Defence Counsel: You don't disagree with that?

Complainant: It was intimate sometimes, yes, it wasn't always rough but it was getting rougher.

Defence Counsel: And it would include biting?

Complainant: No it would not, he'd say it was, if he was kissing me he would bite my tongue and say 'Well I was just kissing her'.

Defence Counsel: And would you bite him too?

Complainant: No, but he'd probably bite himself and say I did it, scratch himself a bit deeper as though I did it. He has been known to do it before.

Defence Counsel: And I want to suggest to you that you would regularly pull his hair?

Complainant: Wrong.

Defence Counsel: Wrong? And that he would also pull yours?

Complainant: Is it a game?

Defence Counsel: Well, if you want to call it a game — well, yes, you can call it a game, but that was something —

Complainant: Well, I don't enjoy my hair being pulled, and I'm sure he wouldn't.

Defence Counsel: Right. Okay. So it wasn't something that you enjoyed.

Complainant: No.

Counsel suggested that the physically aggressive nature of the sexual relationship between the complainant and the accused provided the context within which the complainant's credibility in relation to the specific allegations of rape could be brought into question. By questioning the complainant in this way defence counsel sought to establish that she knew of her ex-partner's propensity for sexual violence and that she in fact enjoyed this aspect of their relationship. To add weight to counsel's argument that the complainant was not fearful of her ex-partner, evidence was also adduced in cross-examination, that she sought contact with him despite the existence of a restraint order. In March 2005 she had obtained a restraint order against the accused preventing him from approaching her or threatening or harassing her, including by email and phone contact. She agreed that she instigated a breach of the order three months later in July 2005 by resuming phone contact with him but argued that she had resumed contact solely in the interests of their child:

Defence Counsel: Is there any particular reason why you initiated contact?

Complainant: No.

Defence Counsel: Okay. So it was just that you wanted to see him, wanted to talk to him, those sort of things?

Complainant: About D, yes. It was D's birthday in February and no birthday cards, nothing from him and I get a bit irate because I just thought he'd send him a birthday card or want to know the reasons why he didn't or —

Defence Counsel: Okay. Well, that's February, you don't get the restraint order until March, so what about once the restraint order is in place why is it that you were trying to contact Mr Allen?

Complainant: For D's sake.

Defence Counsel: For D's sake, okay. So the only reason that you made contact with Mr Allen was because you wanted to?

Complainant: To know if he wanted a relationship with D, if he was going to respond to Christmases, you know, different special times in D's life, whether he was going to take part in that because he was saying he wasn't D's father.

Defence Counsel: Right, okay then. So that was the reason why you started to make contact again?

Complainant: Basically.

Defence counsel then encouraged the jury to be sceptical about this explanation for the breach by obtaining the complainant's confirmation that they had also resumed a sexual relationship.

Defence Counsel: And through those contacts you were — you had a sexual relationship with Mr Allen as well during that time, July/August, is that right, of last year?

Complainant: Yes.

Defence Counsel: Okay.

Complainant: Does it say how many times?

Defence Counsel: No, I wasn't going to ask you how many times?

Complainant: No, well, I wouldn't know either.

Defence Counsel: But I think when the police spoke to you, you mentioned that it was quite regular contact. Would you dispute that in the four weeks leading up to when you made the allegation of rape that you had regular contact with Mr Allen, probably on three occasions a week or three times a week, does that sound about right?

Complainant: When I could get hold of him.

Defence Counsel: And on those occasions you'd have sexual intercourse?

Complainant: I can't say on every time.

The complainant had made allegations of rape on two separate occasions to police. Yet there was evidence that she attempted to contact the accused in between the first and second allegation despite the existence of the restraint order and defence counsel used this evidence to try to secure the complainant's agreement in cross-examination that she had wanted to continue the relationship:

Defence Counsel: [A]nd you also agree that in between the first allegation and the 28th of August, you were attempting to make contact with Mr Allen?

Complainant: Yep.

Defence Counsel: And that was by ringing him?

Complainant: Yep.

Defence Counsel: And by sending him text messages?

Complainant: Yep.

Defence Counsel: And your purpose was to continue to have a relationship with him, is that right?

Complainant: No, for D.

Defence Counsel: For D, right. That contact was despite the fact that there was a restraint order in place?

Complainant: Yes.

Towards the end of cross-examination, the sequence of events was repeated for the benefit of the jury. Counsel first established that on the complainant's own evidence the accused posed a serious physical threat to her — she had taken out a restraint order and had allegedly twice been raped by him. Implicit in counsel's questioning was therefore the rhetorical question, why would she persist with attempts to contact him in those circumstances? There was also the insinuation that the complainant put herself in harm's way and was therefore responsible for what happened:

Defence Counsel: So you — in March of last year, you take out a restraint order against Mr Allen.

Complainant: Yeah.

Defence Counsel: You then continue to contact him.

Complainant: Yes.

Defence Counsel: You then say he rapes you on the 7th of August anally.

Complainant: Yes.

Defence Counsel: You continue to contact him after that.

Complainant: Yes.

Defence Counsel: You don't record it to the police.

Complainant: Yes — no.

Defence Counsel: Well, not at that stage. Is that right?

Complainant: That's right.

Defence Counsel: Yes. You then again make contact with him, and go around to his house, and you say he then again rapes you. Is that right?

Complainant: That's right.

Defence Counsel: Right. And then after that I want to suggest that you continued to make contact with him.

Complainant: Correct.

Defence Counsel: And that you've continued until this day to send him text messages.

Complainant: Whether they're correct, or not, yeah.

The only feasible explanation for the complainant's behaviour, from the defence perspective, was that sexual contact between the two was always consensual, that she had never been raped and that the fact that she consented could be established by the fact that she continued to make contact with him.

6.2.2.4 Witness Credibility

It must be acknowledged that the complainant in Allen's Case performed very poorly in the witness box. When defence counsel confronted her with mobile phone records which appeared to confirm a series of sexually explicit text messages about the alleged incident of anal intercourse, sent from her mobile phone to the accused's phone, she denied sending some and gave the somewhat unconvincing explanation that persons unknown had corrupted the others:

Defence Counsel: If I suggested to you that on the thirteenth of August at 3:58 a.m. you sent the text message that you've been talking about to the incident of anal intercourse would you agree or disagree with that?

Complainant: I'd agree.

Defence Counsel: You'd agree, okay, and I suggest to you that what the message was 'Fuck you know I love you, hard not to cry as the love you gave me anally was absolutely mind blowing, felt embarrassing because you made me love it, but it's the loveliest'. Is that the message you sent?

Complainant: No.

Defence Counsel: No?

Complainant: Similar.

Defence Counsel: Similar?

Complainant: Mmm. A lot of my texts were edited somehow.

Defence Counsel: Right, so your texts were edited?

Complainant: Like bits and pieces taken out of some of my texts to other people and they were all put in together into one sentence in my phone number and it was just — I phoned Telstra about it, so that was done through four different, my landlords. That's the story I knew.

...

Defence Counsel: It's pretty coincidental that you did happen to send him a —

Complainant: It is, yeah. Well, all his friends were hanging around me at the same time, and I didn't know they were his friends so indirectly I didn't know that they knew him.

Defence Counsel: Right. Okay. So — but you'd agree with me, it's pretty coincidental that you did send a text —

Complainant: It is — very. But, I mean, it's —

Defence Counsel: Well, if you could just let me finish the question. That it's coincidental that you say you did send a text message with reference to the anal intercourse —

Complainant: Yes, I did.

Defence Counsel: But that it's somewhat different to the one that's on Mr Allen's phone.

Complainant: Yes.

What is striking in this passage is the way that echoes of the mediaeval exemplar of a genuine victim, chaste, circumspect, demure, are used in a modern trial to discount the complainant's claims of violation. The effect of this evidence on the question of consent is two-fold: it contradicts her claim that the defendant forced himself upon her but in addition, the graphically sexual nature of the text messages suggests that she is used to this sort of language and discussion, that accordingly she is not of good moral character and, therefore, she is the sort of woman who could be expected to have consented. In another lengthy exchange the complainant was asked about her request to have the charges dropped and responded to a clearly sceptical defence counsel with a rambling and disjointed attempted explanation:

Defence Counsel: And you also made a statement to the police wanting the charges withdrawn, is that right?

Complainant: That's correct, Detective V asked me, called me in and my daughter, he was on leave, he called me and my daughter in on one of his days off and said it would be in our best interests if we had the charges dropped because the jury will laugh at me, they're getting a thousand dollars a day and because of all these text messages Rob's been receiving, that I'd have trouble proving that they were wrong, weren't sent from me, if you know what I'm saying.

Defence Counsel: Right, so it was Detective V called you in —

Complainant: Yes.

Defence Counsel: And suggested that —

Complainant: I drop the charges.

Defence Counsel: That you drop the charges, it was his suggestion?

Complainant: Because Rob approached Mum at C's on the 11th of April at the pokies, on the 12th Rob approached me at the pokies, I didn't let the police know because I wasn't sure if the restraining order was still in place or not but one of my friends rang up and found out that the restraining order was still in place as of the 22nd of the 3rd.

Defence Counsel: Right.

Complainant: And it was up to me to go ahead with it and —

Defence Counsel: Okay but just let me get this straight, so Detective V rings you and says, 'Can you come in and make a statement because it would be in your best interest'.

Complainant: He wanted to read me L's statement —

Defence Counsel: Yes, but what about you, in relation to you?

Complainant: Drop the charges.

Defence Counsel: He thought you should drop the charges?

Complainant: And L should drop the charges. So he got me to sign the statement to drop the charges, so I rang up your firm, spoke to J W, I think, and just wanted to, I said to Detective V, that I would ring Robert straight away and advise him from my mouth, from the horse's mouth that the charges are now dropped, may be these phone texts and everything would stop, maybe I'll be left alone.

Defence Counsel: Right.

Complainant: So, but it didn't happen, he thought I was mucking around with him and that the charges weren't really dropped but I'd actually signed them to be dropped thinking that I'd be left alone.

6.2.2.5 An Alternative Approach?

It was not a difficult task for the defence to expose the complainant as a questionable witness of the truth and it may be that her lack of credibility alone was sufficient to create a reasonable doubt about absence of consent in the minds of the jury members.⁵²⁹

Nevertheless, the jury were at no point in this trial provided with the means to determine whether there was a communication of genuinely free agreement on the occasion in question, since this issue was never addressed. In the extracts above defence counsel revealed the complainant as someone who should not be taken seriously and by extension suggested that her claims that she was raped and assaulted should also not be taken seriously. Acceptance of the defence case obviated the need to consider the question of how the Criminal Code defines consent since, in effect, the complainant's poor showing as a witness made her unrapeable. On the other hand, even though the offence of rape under s 185 of the Criminal Code does not require that the complainant resist her attacker, and even though the argument that the complainant's submission was procured by force may carry little weight with the jury (particularly as here where a history of consensual violent sex exists), the prosecution persisted in emphasising the violence of

⁵²⁹ For a statement of the incorrectness of deciding a case substantially on the basis of the witness's forensic performance see *Whisprun Pty Ltd v Dixon* [2003] HCA 48 [122]–[127] (Kirby J). This case is also referred to in chapter 5, 151 nn 8–9.

the episodes in the hopes of securing a conviction. One of the specific purposes of the amendments was after all to get around the problems that even in cases where there is objective evidence of force convictions were not being obtained.⁵³⁰ The prosecution case depended almost entirely on the jury accepting that the evidence of violence within the relationship over the course of time and specifically on the occasion of the second count of rape was sufficient to remove any reasonable doubt about absence of consent. What the prosecution failed to do was explore in any detail the idea that consent must equate to free agreement and that that agreement must be communicated. Apart from the opening address to the jury where the definition of consent as it is set out in s 2A was related virtually verbatim, nowhere did the prosecution try to define with precision how the legal notion of consent was to be applied to the facts of the case. Neither did they explain that the legislation requires that such agreement be manifest at the time of the sexual conduct. Both the prosecution and the defence, instead, sought to rely on inferences drawn from the complainant's behaviour outside the timeframe of the alleged offences.

Allen's Case was always going to be difficult to prosecute, particularly in light of the problems posed by the volatile nature of their relationship, the evidence of the complainant's erratic behaviour and her lack of credibility as the Crown's chief witness. Even so, the amendments were not given the opportunity to work. Allen demonstrates that, even in cases where there is evidence of significant violence, if s 2A is not correctly applied that evidence can still be consistent with consent. This was perhaps a marginal case but it may have been prosecuted more effectively if the prosecution had explored the legal notion of consent, and explained that the evidence of violence was not determinative by itself of the issue of absence of consent. Instead it is one factor in the jury's assessment of the question of whether the complainant positively manifested free agreement to the sexual conduct that was the subject of the charges.

6.3 Conclusion

It is clear from the findings presented in this chapter that evidence of force continues to feature in its pre-reform guise in the prosecution of sexual offences cases despite the intention that the revised consent provisions would refocus and reconceptualise its role. Where such evidence exists it will still be relevant, but the primary focus for the court should now be the question of communicated consent. In chapter 7 two trials in which there was evidence that no consent was communicated are discussed in detail. In examining the circumstances in which the Crown argued absence of consent on the grounds that the complainant did not positively convey her agreement to engage in sexual

⁵³⁰ See Henning, above n 3, 47–50.

activity with the accused it becomes clear that they are limited to situations where the victim was incapacitated due to the effect of drugs or alcohol. These arguments would have been available under the former consent provisions and do not depend on the new possibilities that the amended legislative regime offers for the prosecution of sexual offences. The point has been made in both chapters 5 and 6 that in all of the trials studied the prosecution is not enabling the reforms to operate in a way that enables the jury to focus on what the central question in relation to consent is under the Code. They are not applying the law and therefore not enabling it to do the work that Parliament intended. The same perhaps cannot be said of the trials in chapter 7. It may be that the positive consent standard, set out in s 2A(2)(a) and bolstered by the reasonable steps requirement in s 14A, does not assist in the prosecution of trials involving an intoxicated complainant who cannot testify about whether she consented or not. The difficulties exemplified by these cases strongly suggest that legislative reform is not a complete solution to the problems of rape and sexual assault and justify calls for the development of more innovative reform initiatives.

Chapter 7: Case Study 3

7.1 Introduction

This chapter examines the last of the major themes in the Crown construction of absence of consent evident in the trials. It discusses two cases in detail in which consent was constructed on the basis that the complainant did not positively communicate consent. A positive consent standard is of course the cornerstone of the new Code provisions and it contemplates not only situations where the complainant lacks the capacity to signal consent but also situations where she is immobilised either by fear or because she is overborne by the force of the accused's personality. However, these cases demonstrate that the Crown continues to rely on traditional categories of incapacity only. In both trials, the Crown attempted to prove absence of consent on the basis that the complainant was incapacitated by alcohol or drugs. In neither trial was this argument accepted beyond reasonable doubt. This chapter demonstrates that enshrining the ideals of mutuality and sexual autonomy in legislative enactments is not a panacea for the problems of prosecuting sexual offences in every case. Even if the prosecution engages with the positive consent standard, cases in which the complainant is unable to remember what happened inevitably continue to present difficulties. It may be that these marginal cases will continue to resist resolution by legislative means and that more innovative approaches to reform are needed.

7.2 No Communication of Consent (Savage and McCaffrey)

The reforms to the Criminal Code were designed to reconfigure the understanding of rape and to impose reciprocal responsibility on sexual partners to confirm that the sexual conduct they are embarked upon is mutually consensual. In line with the communicative model of consent that was introduced, coerced sex can be prosecuted as rape even where the coercive behaviour is not violent or even where the degree of violence is objectively minimal. The attempt to widen the scope of criminal sexual conduct was in response to a perception that juries only regard evidence of a substantial degree of violence as probative of absence of consent⁵³¹ and that, as a consequence, cases which do not fit the

⁵³¹ See, eg, Louise Ellison and Vanessa E Munro, 'Of "Normal" Sex and "Real" Rape: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation' (2009) 18 *Social and Legal Studies* 291, 303; Terese Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (University of Tasmania Law Press, 2000) 143; Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217, 217.

conventional violent rape stereotype are more difficult to prosecute.⁵³² Prior to the reforms, it was open to the defence to argue that, although no positive steps were taken to ascertain the existence of consent, it could be inferred from the complainant's passivity. Such an argument might seem particularly plausible in the absence of objectively violent or threatening circumstances. The amended legislation now provides that proof of passivity, in the sense that the complainant gives no indication of agreement or dissent, amounts to proof of absence of consent. Consideration of this question is quite independent of the question of the existence of evidence of force. Thus, the crux of the amendments to s 2A is the facilitation of proof of the element of absence of consent, via s 2A(2)(a), by proof that consent was not affirmatively communicated. If the jury is to entertain a reasonable doubt about the element of absence of consent this requires evidence of affirmatively communicated consent. It might be thought that situations will only rarely arise where the complainant is completely passive and fails to give any indication of her subjective state of mind. The usual understanding of the mechanics of sexual relations is that at the very least the parties will betray their assent by subtle cues, either verbal or physical. However, the provision also comprehends situations where the complainant has been rendered incapable of expressing dissent because of fear or as a result of being overborne by the accused's nature or position. In light of this, it may not be difficult to conceive of cases where the complainant's silence might be reasonably explained as a defensive response to the threat of physical assault, for example.

At least since the decision of *R v Camplin*⁵³³ in 1845, cases involving a sleeping or heavily intoxicated complainant who was incapable of signalling consent have been prosecuted. Potentially, s 2A(2)(a) opens up further possibilities of prosecuting cases where the complainant's passivity is not due to incapacity, cases that might previously have offered little prospect of securing a conviction. Instead, the evidence of the transcripts is that, beyond the traditional cases where capacity to consent is in issue, the Crown is not prosecuting cases where evidence of passivity is more ambiguous. Moreover, in those situations where a strong case might have been made that consent was not communicated, the Crown continues to construct the arguments which relate to absence of consent in terms of incapacity to consent. Absence of consent was constructed around evidence of passivity of the complainant in 11 trials in the study. Of these, all but one (Riley's Case) relied on the traditional categories of inaction, where the complainant

⁵³² Natalie Taylor, 'Juror Attitudes and Biases in Sexual Assault Cases' (2007) 344 *Trends and Issues in Crime and Criminal Justice* 1, 2.

⁵³³ (1845) 1 Cox 22. Camplin plied the complainant with alcohol in order to have sex with her. The House of Lords determined that there was no force requirement for rape and, even absent evidence of violence or resistance, it was sufficient to prove that the complainant had not given her consent.

is asleep or incapacitated by drugs or alcohol, to argue that there was no positive communication of consent. Once again, the following cases have been singled out for discussion on the basis of the general applicability of the findings and the preponderance of textual illustrations of this particular theme that they evince. The discussion of Savage's Case below, illustrates the principle that, in relying on evidence of intoxication, the Crown is vulnerable to the counter claim that the intoxication was not sufficient to incapacitate the complainant.

7.2.1 Savage

Savage's Case involved the alleged rape of a young woman by a recent acquaintance. Cases such as these, routinely referred to as 'date rapes', are notoriously difficult to prosecute since, as Bohmer states, 'while we find it hard to believe that someone would consent to sex with a person she has never seen before in her life, the same is not true for someone she knows, however slightly.'⁵³⁴ In such cases there is often no evidence of physical injury or threat of harm to support the complainant's claim that intercourse was non-consensual. In addition, the jury may not be sympathetic to the victim because she engaged in what is perceived as inappropriate or risky female behaviour—drinking or taking drugs, dressing provocatively, or going home with a man she has just met. She may also be considered partly to blame for the rape if she has engaged willingly in other sexual acts with the accused, short of intercourse. Traditionally, rape laws have been ill-suited to the prosecution of date rapes but new laws which emphasise the presence of mutual and affirmative consent coincident with the particular sexual conduct in question should have improved the prospects of obtaining convictions in such cases.

7.2.1.1 A Question of Capacity

The essence of the Crown case in Savage was that the complainant was so affected by alcohol that she was unable to give consent and that this must have been obvious to the defendant. Although this may have been the case alleged, it is a difficult basis on which to prosecute, especially if the prosecution does not utilise the law well to do so. The argument that the complainant's degree of intoxication was critical in determining the issue of absence of consent created the impression that capacity was the only question for the jury. This conclusion is supported by comments addressed to the jury in the trial judge's summing up. In relation to the element of absence of consent his Honour made no reference to the requirement of free agreement, merely advising the jury:

⁵³⁴ Carol Bohmer, 'Acquaintance Rape and the Law' in Andrea Parrot and Laurie Bechhofer (eds), *Acquaintance Rape: The Hidden Crime* (Wiley, 1991) 319.

His Honour: Now it's a matter for you as to what amounts to conduct communicating consent.

Instead, the question of capacity was highlighted as the issue most likely to occupy the jurors' minds:

His Honour: So you in this case need — or I think you may very well need to consider the evidence about how intoxicated she was and to consider whether she was capable of giving a consent that the criminal law would recognise as consent.

Since capacity was presented as the primary issue, the jury could not find that consent was absent unless they were satisfied that the complainant was incapable of giving consent and, arguably, they would require compelling evidence to be so satisfied. In fact, the prosecution was unable to adduce independent evidence of the complainant's degree of intoxication beyond a suggestion by a friend that she was a bit drunk:

Prosecution Counsel: Do you recall having a conversation with A about A leaving?

Witness: Yep. After about two hours of being there she came up and said that she was tired and she wanted to go home. She was noticeably, yeah a little bit intoxicated, she—

Prosecution Counsel: What told you that?

Witness: She was giggly and very loud which is not like A at all really, yeah she was slurring her words a bit and yeah.

They had to rely, therefore, on the testimony of the complainant herself. Her evidence was contained chiefly in two passages in examination-in-chief where she described being unexpectedly overcome by a strange numb feeling:

Extract 1

Prosecution Counsel: And how did you feel so far as affects of alcohol is concerned the moment that you went out the door?

Complainant: I did feel affected by alcohol but not to the point that I was beyond control.

Prosecution Counsel: Right. Could you walk?

Complainant: Yes.

Prosecution Counsel: Could you talk?

Complainant: Yes.

Prosecution Counsel: Had you been in the toilet vomiting or anything like that?

Complainant: No.

Prosecution Counsel: Now you go outside and you start to walk home?

Complainant: Yes.

Prosecution Counsel: And I think you told us earlier but that's about a kilometre and a half?

Complainant: Yes, it is.

Prosecution Counsel: What happens as you are walking home?

Complainant: I got about 200 metres down the road and I heard a car come up behind me. I was feeling a bit woozy by this stage. The car pulled over. It was a white ute and it was Mr Savage asking me if I would like a lift. I felt, as I said, a bit woozy and a bit unsteady on my feet so I decided it wouldn't be too much or bad idea to catch a lift home with someone.

Prosecution Counsel: Now just tell us about this woozy feeling. Can you give the jury some more detail about that please?

Complainant: I felt, yeah, a bit beyond control of my body. My vision was blurry.

Prosecution Counsel: Well how did that compare to when you left?

Complainant: It was quite a lot of a different feeling.

Prosecution Counsel: Now you told us you were able to walk when you left, what was it like when you started to feel like this so far as walking is concerned?

Complainant: It came on very quickly and, yeah, I was — felt pretty much numb.

Extract 2

Prosecution Counsel: Just tell us about that, I realise it's difficult but you say you wake up and he's having sex with you, how do you know that?

Complainant: I was still fairly numb but I just knew something was going on, I could see, I could barely talk, I found it quite a struggle to say anything and I just, yeah—

Prosecution Counsel: Well could you feel anything, I'm sorry to ask you this but can you feel anything that tells you that sexual intercourse was occurring and what if anything can you feel?

Complainant: Yes I felt him inside me.

Prosecution Counsel: Right. Sorry again, there's a formal aspect of this and I don't believe it's controversial so I'll lead it but you could feel his penis in your vagina?

Complainant: Yes.

Prosecution Counsel: Now when you realise that's happening is that something that you wanted to be happening?

Complainant: Definitely not.

Prosecution Counsel: Did you try and stop it happening?

Complainant: I couldn't.

Prosecution Counsel: What do you mean by that, you couldn't?

Complainant: As I said I did feel completely numb and completely unable to do anything.

Prosecution Counsel: What about saying anything?

Complainant: As I said, I did try to say something, but nothing could come out.

This was the crux of the Crown case and the persuasiveness of the complainant's account was critical to a successful prosecution. However, the flimsiness of the evidence of intoxication was easily exposed by the defence in cross-examination:

Defence Counsel: So a few moments before you're in bed with him on top of you unable to speak or move?

Complainant: Yes.

Defence Counsel: You eventually manage on your evidence to get something out to the extent of 'stop' or 'get off' or something like that and then again within minutes of that, a very short period of time when you feel that you're going to be sick you are able to get up from the bed, make your way to the bathroom, get to the toilet, vomit, get up and get back and get back into bed?

Complainant: Yes.

Defence Counsel: So you regain all those physical abilities that you hadn't had only moments before?

Complainant: Yes I wasn't exactly straight forward about it though.

Defence Counsel: So your evidence is, again, that one minute you're laying there, you can't move, you can't squirm, you can't move your arms, you can't even speak and then within a matter of minutes you are able to get up, go to the toilet, be sick and then make your way back to bed?

Complainant: Yes.

Defence Counsel: So you are able to walk out of your room, down the hall, into the toilet, be sick and repeat the process?

Complainant: Yes it's not actually that far.

Defence Counsel: Okay. And did you also go to the bathroom and put a towel around yourself after you'd been sick?

Complainant: Yes.

Defence Counsel: So you were able to do that as well?

Complainant: Yes.

Defence Counsel: So your physical sort of faculties came back pretty quickly did they?

Complainant: Yes they did.

If this evidence generated a reasonable doubt about the complainant's incapacity it would secure an acquittal, and arguably it might have done so without difficulty. Since the Crown constructed absence of consent solely on the basis of incapacity, if the jury entertained doubts about the true extent of the complainant's intoxication then the entire prosecution case would crumble.

7.2.1.2 Drunken Consent

What is more, the focus on the complainant's degree of intoxication invited the jury to consider the alternative possibility that she gave a drunken but nevertheless valid consent. This was precisely the way that the defence characterised the events. As the chief Crown witness the complainant could not testify directly that she had not consented as she claimed to have no memory of the period of time immediately preceding her realisation that the accused was having sexual intercourse with her. Instead, the questions posed in examination-in-chief seemed directed at constructing an inference of absence of consent from evidence that she had no sexual interest in the accused and intimations that he had preyed upon her in her intoxicated state. Evidence was adduced that there was little interaction between them at the party earlier in the night:

Prosecution Counsel: Were you attracted to him at this point?

Complainant: No.

...

Prosecution Counsel: What was your impression of him?

Complainant: I have to admit I thought he was a bit on himself, talking himself up a bit.

...

Prosecution Counsel: Did you have any conversation just directly between yourself and Mr Savage, about any subject that you can recall?

Complainant: No.

Prosecution Counsel: Did he ask you whether you wanted to have sex with him?

Complainant: No.

Prosecution Counsel: Did you want to have sex with him?

Complainant: No.

The prosecution also implied that the accused may have spiked her drink. The complainant described the onset of a sudden and unusual sensation of being grossly intoxicated that she claimed could not be explained by the number of alcoholic drinks she had consumed. Crown counsel suggested in his opening address that there might be a sinister undertone to the events of the night:

Prosecution Counsel: She'll tell you that approximately 200 metres into that journey and she started to feel, and I'm using her word, 'weird', that her vision was blurry and she found walking a real effort and it's at this moment that the accused, Mr Savage, pulls up in his white utility and offers A a lift. A accepts that and Mr Savage drives her directly to her house and seems to know where that is ... it's the

Crown case that at this point, he was certainly contemplating the possibility, at least of having sexual intercourse with A.

The prosecution could not overtly state that something had been put in her drink because of the forensic impossibility of proving such a claim. However, if the jury accepted this gloss on the accused's actions, they might have difficulty reconciling it with the existence of the complainant's consent.⁵³⁵

A very different version of events was put in cross-examination. In a lengthy passage defence counsel asked the complainant about the alcoholic drinks she had consumed, who had purchased them, the type and alcoholic content of each drink and how long each had taken to drink. He then suggested, and was not contradicted, that it was possible that she had underestimated the number of drinks:

Defence Counsel: Right, so how many drinks did either D and or Mr Savage buy you in total do you think?

Complainant: It would have been probably two maybe three.

Defence Counsel: Two maybe three. So your evidence is that you had no more than, what, four or five drinks?

Complainant: Yes.

Defence Counsel: Well if you and L bought a couple each and they bought you two or three, what, you could have easily had half a dozen drinks if you've just misplaced or miscounted one or two couldn't you?

Complainant: Maybe, yes.

Defence Counsel: And you've had the first lot fairly quickly, the first two or three fairly quickly it seems?

Complainant: Yes.

The crux of the defence case was that, in her intoxicated and uninhibited state she happily accepted drinks from the accused, flirted and danced with him and ultimately took him to bed.

Defence Counsel: And you accept — or do you accept that sometimes when you've had a few drinks, that you lose some of your shyness and your inhibitions and you talk to people and you relax and you laugh and do those sorts of things that perhaps you wouldn't do if you hadn't had a couple of drinks?

Complainant: Yes, I do accept that.

Defence Counsel: And sometimes, you know, having a few drinks when you're talking to blokes can, I suppose, ease the conversation a bit?

Complainant: Especially people I don't know.

Defence Counsel: Yeah. And that's what happened this night, wasn't it?

Complainant: I guess.

Defence Counsel: Yeah. And I'm going to suggest that you were friendly and even a little interested in Mr Savage, he sounded like quite a nice fellow?

Complainant: I wouldn't say interested.

⁵³⁵ In interview, prosecution counsel confirmed that this was the Crown's intention. Part of the Crown case was that the accused had 'taken a fancy' to the complainant, had spiked her drinks and then followed her home, intending to take advantage of her in her stupefied state: Interview with Crown counsel (Launceston, April 11 2011).

7.2.1.3 An Alternative Approach?

It is quite conceivable that this case might have been prosecuted differently by exploiting the amended provisions in the legislation. From the outset, the prosecution approached the question of absence of consent from the perspective of capacity to consent rather than the lack of evidence of affirmative communication of consent. This may explain why, in his opening address, counsel did not offer the jury a more expansive explanation of the legal concept of consent and its requirement of communicated free agreement. Counsel explained that consent means free agreement and then confined his address to a discussion of s 2A(2)(h) as the relevant provision in the circumstances of the case:

Prosecution Counsel: [T]he ones that may be relevant here are, first of all: ⁵³⁶

“Does not say or do anything to communicate consent, or is asleep, unconscious or so affected by alcohol or another drug as to be unable to form a rational opinion in respect of the matter for which consent is required.”

Now that probably has some work to do here. Whether the state of the complainant was such that she was so intoxicated that she was beyond the capacities to provide consent, to therefore provide what we call free agreement.

There were no further references by prosecution counsel, either in opening addresses or in the course of the trial, to the notion of free agreement or to the sort of conduct which might or might not amount to valid consent. Nowhere was it explained to the jury that free agreement imparts the notion of mutuality in sexual relations and that there is thus a requirement that consent be communicated by words or conduct. The substance of the cross-examination of the complainant suggests that such an explanation might have benefited the Crown case. Many of the questions put to the complainant related to things that she failed to do. She did not refuse the drinks Savage bought her, she did not object to him sitting at a table with her, she did not ask him not to come into her house. The following exchange illustrates how, in attempting to create an impression that the sexual conduct was consensual, for the most part the defence contentions were couched in negative terms. Thus:

Defence Counsel: So you didn’t, you didn’t find it an unappealing proposition to spend time with him and his friend?

...

Defence Counsel: So why didn’t you say at some point, ‘look please don’t come in, I really don’t feel well, I need to go to bed now’?

...

Defence Counsel: Why did you not say, ‘Look, I feel terrible, you’re going to have to go’?

Since the jury was not told about the existence of a positive consent standard they may have concluded that acceptance of the defence case that the complainant did not

⁵³⁶ Despite the implication here that counsel understood there were others sub-sections of s 2A that were relevant, s 2A(2)(h) is the only one that is explicitly referred to.

communicate non-consent was sufficient to create a reasonable doubt about absence of consent. This thesis argues that it is not. As has been pointed out elsewhere in the case studies, whilst absence of dissent may be a factor for the jury to take into account in evaluating the evidence relating to consent, it is not, of itself, evidence of free agreement. It must also be supported by evidence of affirmative, communicated consent.

The prosecution in Savage's Case placed a single argument before the jury, that the complainant was incapable of giving her consent to sexual intercourse. The jury should have been advised that the determination of that question was not the end of the matter. If they were not satisfied that the complainant was incapable of giving consent they still had a further question to consider, that is, whether the evidence relating to her conduct amounted to evidence of free agreement as framed in s 2A. For example, the following exchange gave the complainant the opportunity to tell the jury what happened:

Prosecution Counsel: Okay and Mr Savage pulls up?

Complainant: Yes.

Prosecution Counsel: What sort of vehicle is he driving?

Complainant: The white ute.

Prosecution Counsel: Now he offers you a lift?

Complainant: Yes.

Prosecution Counsel: And you accept that?

Complainant: Yes, I did.

It also enabled the prosecution to subtly insinuate that the defendant's sudden arrival may not have been coincidental, but part of a deliberate strategy to have sex with the complainant.⁵³⁷ Earlier in examination-in-chief it had been established that when the complainant told her friend she was walking home, the accused was not within earshot. Yet she had not walked far before the accused appeared in his car:

Prosecution Counsel: And had you made any arrangement with him to give you a lift home?

Complainant: No, I hadn't.

Prosecution Counsel: Can you describe the vehicle that you got into?

Complainant: It was a white Hilux ute, 2 doors.

Prosecution Counsel: Right. And where did it go to?

Complainant: And it went directly to my house and he knew where I lived and he drove around the back of the house and parked around the back.

Prosecution Counsel: You said he knew where you lived. Did you tell him that?

Complainant: Not initially.

Prosecution Counsel: Right. Well, you've made a statement he knew where you lived. Why do you say that?

Complainant: At the start of the year before, my flat mate must have invited some friends—

Prosecution Counsel: No, um, did he relate this to you in a conversation in the car?

Complainant: I think so.

Prosecution Counsel: Right. But he just seemed to know where you lived?

Complainant: Yes.

⁵³⁷ See above n 5.

This exchange was designed to support the Crown case that the complainant would not have consented to the sexual intercourse that ensued since, together with the implication that the complainant's drinks had been spiked, the jury may have been left with the impression that the defendant's conduct was predatory rather than opportunistic. However, if the jury accepted this they might then have questioned why the complainant would agree to get in the car with him. What Counsel failed to do was offer an explanation for her conduct and probe into the reasons why she had accepted a lift from a man she barely knew when she was only a short distance away from home. Accepting a lift from a stranger is a classic vignette in victim blaming narratives and the prosecution should have been alert to the real possibility that the jury would interpret the complainant's willingness to get in the car as a signal that she was open to sexual intimacy with the accused. It was critical, therefore, to forestall such a conclusion by accounting for her conduct on the grounds that accepting a lift was a safer course than attempting to walk further in her grossly intoxicated state. The perfunctory investigation of the complainant's thought processes at the time suggests a failure to appreciate the importance of this step.

7.2.2 McCaffrey

7.2.2.1 A Question of Capacity

McCaffrey was another case that illustrated the difficulties of prosecuting rape cases where the parties are acquainted. As in Savage's Case the Crown relied almost exclusively on s 2A(2)(h), that is, that the complainant was incapacitated by alcohol and unable to give consent. Accordingly, the focus of witness questioning was largely restricted to the issue of capacity. Much of the examination-in-chief was taken up with establishing how much the complainant had drunk, what type of alcohol it was and how quickly she drank it. There was also third-party testimony, not present in Savage's Case, that the complainant had passed out drunk on a couch:

Witness: J got up off the mat on the floor where we were playing cards and went and laid down on the couch and within five minutes she was asleep.

Prosecution Counsel: And when she got up did you notice anything about her manner?

Witness: She was very drunk.

The defence again demonstrated how flimsy the Crown case can be when it is based solely on the complainant's incapacity. They pointed out that she hadn't really had that much to drink:

Defence Counsel: Alright, so your recall of the alcohol you consumed that night is three quarters of a bottle of Sauvignon Blanc?

Complainant: Yep.
Defence Counsel: And one shot of Rumba?
Complainant: That's what I recall.

They extracted her agreement that three quarters of a bottle of wine was not a large volume for her to drink:

Defence Counsel: You drunk, on your account, three quarters of a bottle of Sav Blanc, not much, quite standard for you?
Complainant: Mm.

They also referred to an example from the recent past where she had consumed so much alcohol that she vomited but, despite being grossly intoxicated, on that occasion she didn't pass out or lose her memory of events. The unspoken implication in the following exchange is that since she was less intoxicated on the night of the alleged rape the jury might reasonably doubt her claim that she could not remember anything about those events:

Defence Counsel: So your state of intoxication that night led to you vomiting?
Complainant: Yes.
Defence Counsel: All right but it didn't impact in any way on your memory?
Complainant: No.
Defence Counsel: You recall that night clearly, do you?
Complainant: Yeah.

The defence relied on the evidence that on the night of the alleged rape she continued to play cards, conversed coherently with the others and was able to walk around without difficulty to show that she wasn't completely incapacitated. As argued in relation to Savage's Case above, the jury may have been left with the impression that acceptance of the defence evidence in relation to capacity sufficed to determine the issue of absence of consent. The trial judge directly addressed this issue in summing up, making it clear that the question of capacity was but one aspect of the issue of absence of consent:

Trial Judge: Now ladies and gentlemen, the issue on this consent question is not just was she incapable because of alcohol. It's not only the question of was she incapable of forming a rational opinion concerning the giving of consent because of alcohol. The question is, did she consent, did she freely agree to it? ... And what they also say in Parliament, and that's the law we have to comply with, it's not free agreement if she does not say or do anything to communicate that she consented.

However, the prosecution did not examine the question of the absence of positively communicated free agreement and thus, in deliberating on the element of absence of consent, the jury only had evidence relating to incapacity to consider.

7.2.2.2 Drunken Consent

The other difficulty for the prosecution, which was a problem in Savage's Case as well, was how to disprove the defence claim that this was a case where the complainant had

simply forgotten that she had communicated consent to sexual intercourse. The complainant responded to that suggestion by insisting even if she could not in fact remember whether or not she had agreed to sex, she was certain that she would not have consented:

Defence Counsel: So, in essence, as I understand what you're saying, is, 'I just don't remember, so I can't say whether that happened'?

Complainant: I wouldn't have done it.

Defence Counsel: Well, you think you wouldn't have done it?

Complainant: No, no, I wouldn't have done it.

Defence Counsel: But you don't remember whether you did or not?

Complainant: I don't remember anything—

Defence Counsel: Right?

Complainant: —but I do not — I would not have done that. I would not, I'm not like that.

However, the defence was able to exploit her memory lapses about other things she had done that night to challenge her absolute certainty that she would not have given consent to intercourse. For example, she claimed not to remember pouring three large glasses of rum into a jug so that individual drinks could be poured into small shot glasses.

Defence Counsel: Do you recall Phil bringing some Rumba out in tall glasses and you returning to the kitchen and getting a measuring jug and some shot glasses?

Complainant: No I do not remember that.

Defence Counsel: Don't remember that?

Complainant: No.

An independent witness confirmed that she had done so. Counsel was then able to extract a concession in relation to this unremembered incident that it was something she might have done. By analogy, counsel implied that if she conceded that possibility then she would also have to concede the possibility that she had, albeit uncharacteristically and perhaps surprisingly, consented to sex:

Defence Counsel: [I]t was against that background that sexual intercourse happened?

Complainant: It wouldn't have happened.

Defence Counsel: That you were actually participating in this act of sexual intercourse?

Complainant: No, I would never have.

...

Defence Counsel: Would you have taken the Rumba from tall glasses, poured it into a measuring jug and then put it into shot glasses, is that the sort of behaviour you might accept you would do?

Complainant: Yes.

The argument that the complainant has no memory of the incident but is convinced that she would not have consented may carry little weight in any case. Senior defence counsel in Savage's Case stated, at interview, that he believes juries are often sceptical of such arguments. Jurors consider that the complainant is rationalising and that she really has no idea at all about whether she consented or not. If this is the case, then although adducing

evidence that the complainant has no memory of the events may be necessary as part of the case alleged, it may not be adequately probative. Proving lack of capacity to consent due to alcohol consumption is a difficult task for the prosecution and the case may fail if that is its sole prosecutorial basis. It suggests that lack of communicated agreement should always be considered as a crucial ingredient in absence of consent, as the trial judge in this case explained.

7.2.2.3 Prior History

There was, not unusually, no independent evidence relating to the issue of consent in this case. The parties had lived in the same house for a couple of months but it was not suggested that they had been physically intimate previously or even that they regularly socialised together. However, both the prosecution and the defence argued that instances of physical contact between the parties occurring weeks before the alleged rape were relevant to the jury's determination of the issue of consent. The prosecution used the evidence to confirm that the complainant had no sexual interest in the accused:

Complainant: He told me that he had been raped by a male when he was 20.

Prosecution Counsel: And how did the talk or the conversation turn after that?

Complainant: Well he was crying and I felt, you know, I felt sorry, you know, I thought what an awful thing to happen so I gave him a hug.

Prosecution Counsel: How close a hug?

Complainant: It was just a normal friendly hug but it was close enough to feel that he had an erection.

Prosecution Counsel: And in response to that what did you do?

Complainant: I was just — I didn't do anything, I was just disgusted. I didn't say anything.

The defence used the evidence to imply that she *was* sexually interested in him:

Defence Counsel: Well I want to put to you that in the time that you and Phil were flatmates that there were in fact two quite separate episodes of physical contact between you. One was when he told you about being raped and you shared the hug?

Complainant: Mm.

Defence Counsel: That you've told us about. But on an entirely different night, you'd been out together at a nightclub and that night you'd hugged and you'd held hands?

Perhaps due to a lack of other evidence which might go to the issue of absence of consent, for both prosecution and defence, these incidents assumed an unwarranted relevance in relation to the question of whether or not the complainant had consented to the act of sexual intercourse that was the subject of the charge. The issue of consent must be addressed in the context of consent to particular sexual conduct, which in this case is evidence that tends to prove whether or not the complainant freely agreed to sexual intercourse on the night in question and not evidence that shows that she demonstrated

affection several weeks before. In responding to the insinuation by defence counsel the complainant showed that she, at least, recognised that these incidents were irrelevant:

Complainant: Doesn't mean — doesn't give him the right to rape me.

Her response goes to the heart of the problems of prosecuting rape — that, her assertions to the contrary notwithstanding, any aspect of the complainant's behaviour, no matter how distant in time or objectively irrelevant, may be mobilised in the context of unrelated sexual acts to infer consent.

7.2.2.4 An Alternative Approach?

Whilst the notion of capacity is intrinsic to consent to sexual relations it is not a sufficient marker of the free agreement stipulated by s 2A of the Criminal Code. The prosecution in McCaffrey's Case failed to emphasise that consent to sexual relations consists of mutual and affirmative agreement to the particular acts in question and that being satisfied about capacity to consent is only a preliminary aspect of the jury's enquiry. Accordingly, the defence was able to urge the presence of consent by relying on actions of the complainant that were arguably of no consequence. For example, counsel put to the complainant that she voluntarily got up from the couch and joined the accused on the floor. This, it was suggested, might reasonably be regarded as a signal that she was consenting. It may be that the outcome in McCaffrey's Case would not have been otherwise even if the prosecution had successfully engaged with the aims of the reforms. However, particularly in light of the evidence that the complainant was heavily intoxicated, further guidance on the legal notion of consent and the operation of s 14A in relation to mistake seemed to be required. Arguably, an unequivocal indication of agreement was called for. The jury should have been invited to question whether in this particular context the complainant had communicated a valid consent and whether the defendant had taken reasonable steps to ascertain the existence of consent. As it was, the only direction the jury received in relation to the evidentiary basis for a belief in consent was in the following terms:

His Honour: He seemed to me to accept that she was asleep when he went up to her, then he said he spoke to her, and then she did indicate consent by getting off the couch. He said that she did take her own pants down and he also said that she gave him a hug and urged him on.

Even though the Code definition imposes a standard of mutuality that in these circumstances arguably required more unequivocal signals of consent, if the jury accepted this evidence it was open to them to accept it as evidence of communicated consent. The difficulty for the prosecution is that they were not able to contest its accuracy because the complainant had no memory of events. Cases such as Savage and

McCaffery illustrate how difficult it is to establish the element of absence of consent where the complainant cannot recall what happened. The communication standard may not be of much help in prosecuting cases where both parties have been drinking. Even if the Crown case is well constructed the paucity of evidence may preclude proof of absence of consent beyond reasonable doubt. The difficulties are exacerbated by the real possibility, in rape cases involving voluntarily intoxicated complainants, that the jury will consider that she should bear some responsibility for the sexual conduct that eventuates.⁵³⁸ Whatever possibilities the Code reforms offer in other situations, cases like these may lie beyond the reach of legislative reform. If a solution is to be found, alternative approaches to reform will be called for.

7.3 Conclusion

The amendments to the Criminal Code were intended to expand the understanding of rape and demarcate the boundaries of the notion of consent to sexual conduct. They were an attempt to arrest the fluidity that accompanies the understanding of consent generally and to pin down in the criminal context what consent to sexual intercourse means. If the amendments are not put to work properly, the legal notion of consent remains a rubbery concept, bedevilling the prosecution of sexual offences and allowing extra-legal considerations to taint the jury's determinations. The analysis of the cases reveals a failure of the prosecution and some judges as well to understand this, with the result that the promise of the amendments is being subverted by a lack of their application. The defence is also implicated in the failure to properly implement the new Code provisions. To an extent the defence tactics are dictated by the case that the prosecution constructs but they too are bound, by reason of their duty to the administration of justice, to apply the law correctly. Too often the defence case relies on an interpretation of the definition of consent in s 2A that is no longer an accurate statement of the law. Too often inappropriate analogies are drawn with the domestic understanding of consent. So we see cases where it is argued that a failure to manifest dissent amounts to evidence of consent. We see cases where consent is inferred from evidence of consent to past sexual conduct. We see cases that suggest that evidence of passivity has no role to play outside the context of victim incapacity. And we see that the same themes pre-dominate in the construction of absence of consent and the defences to evidence of non-consent as Henning identified in her report on the previous consent provisions.⁵³⁹

⁵³⁸ See Emily Finch and Vanessa E Munro, 'Juror Stereotypes and Blame Attribution in Rape Cases Involving Intoxicants' (2005) 45(1) *British Journal of Criminology* 25.

⁵³⁹ Henning, above n 1.

In many ways, real rape reform requires a fundamental cultural shift, both at the criminal justice system level and at the broader social level. It requires re-education about human sexual interactions that, in place of discriminatory gendered stereotypes, emphasises mutual, autonomous, affirmative and freely granted consent as the hallmark of legitimate sexual conduct. Clearly, this is a mammoth undertaking and it may be that, with little evidence of the efficacy of legislative reform, the time is ripe to consider more innovative approaches to the problem of consent in the law of rape and sexual assault. The next and final chapter considers where the explanations lie for the lack of success of the Tasmanian reforms that are the subject of this thesis and why complainants still contend with archaic attitudes about female sexuality and expected victim responses to sexual assault. It examines the failures of the respective legal actors to construct their case in line with the new legislative framework and to explain the new legal notion of consent. It notes the failure of the bench to set out a principled approach to determining the availability of the mistake defence and the failure to provide guidance to juries in their deliberations on the issue of absence of consent in the legal context. The chapter argues that in continuing to adopt a pre-reform construction of absence of consent and in continuing to permit mistakes about consent to be grounded in prejudicial assumptions the legal system has failed to confront the anachronistic attitudes towards women and female sexuality that remain the biggest barrier to successful rape law reform. For this reason, the proper education of legal personnel is critical. It is inevitable that there will be a time-lag between the implementation of reform and the manifestation of its effects. However, if the amendments to the consent provisions were being properly marshalled, by now one might expect to see the fruits of reform, at least in the most recent of the cases analysed in this study. Given the evidence that legislative reform alone is unable to expose these attitudes as erroneous and irrelevant and to expunge them from the trial context, the chapter concludes with suggestions for further, more innovative reform initiatives.

Chapter 8: Success of the Reforms — Assessment, Recommendations and Conclusion

8.1 Introduction

Reforms aimed at reducing the rates of attrition for sexual offences and improving the prospects of successfully prosecuting both stereotypical and non-stereotypical⁵⁴⁰ non-consensual sexual conduct have developed quite a pedigree. Many of the efforts have focused on legislative reform of sexual offences statutes although there have also been important extralegal initiatives such as the establishment of sexual assault services, the growth of victim advocate groups and increased training of police officers in responding to victims of sexual assault.⁵⁴¹ The point was made in chapter 1 that in the end statutory reform may be largely symbolic and, at least in the absence of complementary initiatives, fail to deliver significant change. Though this may be true, it is overly simplistic to dismiss legislative reforms as of symbolic value only. Even were this the case, the symbolic function of statutes may be immensely important. As Caringella says:

The law holds the uniquely influential power to change conceptualizations about what we hold to be decent, acceptable, and good as opposed to bad, unacceptable, and criminal. Hence the law stands as the moral posture for a culture.⁵⁴²

The 2004 reforms in Tasmania were an example of a legislative approach to the problems of prosecuting sexual offences. As stated in the introductory chapter, the aim of this research was to establish whether these reforms are being implemented in accordance with the objectives identified in government debate on the legislation. The findings provide evidence that, whatever their symbolic importance as a statement of cultural values, it cannot be said that they are being implemented as Parliament and the reform advocates intended. The reforms were designed to ensure that the issue of consent to sexual conduct is evaluated according to standards of mutuality and reciprocity and that therefore, absence of consent can be established by adducing evidence that the complainant did nothing to indicate consent.⁵⁴³ This concluding chapter explores the reasons why, at least by this measure, the reforms have not been successful and suggests

⁵⁴⁰ ‘Stereotypical’ refers to sexual assaults in which the perpetrator is a stranger or there is evidence of violence, the use of weapons, vigorous resistance by the victim or victim incapacity. ‘Non-stereotypical’ is used to identify incidents involving partners or acquaintances in which these features are absent.

⁵⁴¹ For a summary of the major reforms in the Common Law jurisdictions of the United States, Canada, England and Wales, Australia and New Zealand see Susan Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, 2009) ch 2.

⁵⁴² Ibid 203.

⁵⁴³ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 44 (Judy Jackson, Attorney-General).

that there are steps that can be taken that might make them more effective. The results of the analysis indicate that the lack of success is not grounded in any inherent shortcomings of the legislative changes themselves, rather, it is chiefly due to an apparent reluctance or inability of lawyers and judges to engage with the new concept of consent that the reforms have embodied. There is a need for education to accompany any major law reform but all too often this aspect of the law reform process is overlooked. In the case of the 2004 reforms the Minister's second reading speech strongly emphasised that these reforms constituted a radical new direction in the law of rape and sexual assault but little else was done to ensure that, in working with the new provisions, legal officers followed the route mapped out. There were no formal initiatives to educate members of the legal community about the purpose and effect of the new legislation. It is critical to the success of the reforms that the individuals who are directly responsible for implementing the changes understand what those changes are and what implications they have for their legal practice. For real progress to be made in this area there must be broad attitudinal change at the societal level and this change should be driven by the legal community.

8.2 Central Problems with the Reforms' Implementation

The fact that the reforms have not achieved their stated objectives is due chiefly to an apparent unwillingness of the prosecution, the defence and the bench to try to apply the reforms according to their terms and legislative intent. This unwillingness seems, at least in part, to be engendered by a belief that those aims will be thwarted in any event by the predetermined attitude of the jury. As representatives of members of the public, it is likely that jurors will be influenced by stereotypes about rape and approach the evidence at trial with particular prejudices. This view has widespread acceptance⁵⁴⁴ but there seems to be a sense of futility about attempting to tackle those prejudices. As one defence counsel explained, the amendments have not really made a difference because the jury will still interpret things the way that they always have.⁵⁴⁵

The impact that perceived juror stereotypes have on the prosecution of rape cases cannot be overstated. Entrenched social attitudes not only influence the ultimate trial outcome but also have an impact at every point in the process leading to trial. The reality that they assume about sexual assault shapes victims' understanding of whether the unwanted sexual contact that they have experienced in fact amounts to a criminal

⁵⁴⁴ See Jennifer Temkin and Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008); Louise Ellison and Vanessa Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49(2) *British Journal of Criminology* 202.

⁵⁴⁵ Interview with defence counsel (Hobart, October 11 2010).

transgression.⁵⁴⁶ They influence decisions about whether to make a complaint since women may consider it is not worth exposing themselves to the trauma of a trial when the accused is unlikely to be convicted. They influence the assessment of whether a complaint is likely to be taken seriously and the prospects of a successful prosecution. They influence police decisions about laying charges⁵⁴⁷ and the Director of Public Prosecution's decisions about instituting criminal proceedings.⁵⁴⁸ As a consequence of the influence of stereotypical assumptions, non-violent or acquaintance rape is distinguished from so-called real rape and is not considered as serious as rape that displays the characteristics of violence, the use of weapons or assault by a stranger. There are various reasons why this is so. They include the fact that media reporting of rape is often limited to sensational cases which generates an impression that most so-called genuine incidents conform to the stereotype of rape.⁵⁴⁹ In addition, at least in the context of a consensual relationship, the sexual conduct that forms part of the actus reus in this area of the law is within the experience of many juror members. Accordingly, jurors may assume a degree of expertise that they would not assume in adjudicating a case of stealing or murder for example. They may consider it artificial or unreasonable to seek evidence of positive communication of consent when their own sexual experience is that consent is only ever acknowledged tacitly. Equally, they may themselves have attempted to persuade a reticent sexual partner by employing a degree of force or submitted to sex because of such pressure yet not considered the conduct to be rape.

In an effort to neutralise the adverse effects of stereotypical thinking about real rape jurors must be told that they are obliged to apply the law in its own terms and that this will involve them adopting a legal perspective on matters of consent. They must be encouraged to jettison personal beliefs about rape or genuine victims of sexual assault

⁵⁴⁶ See, eg, Janice Du Mont, Karen-Lee Miller and Terri L Myhr, 'The Role of "Real Rape" and "Real Victim" Stereotypes in the Police Reporting Practices of Sexually Assaulted Women' (2003) 9(4) *Violence Against Women* 466; Arnold S Kahn, Virginia Andreoli Mathie and Cyndee Torgler, 'Rape Scripts and Rape Acknowledgment' (1994) 18(1) *Psychology of Women Quarterly* 53.

⁵⁴⁷ The classic study on police no-criming of reported rapes is that conducted by Clark and Lewis, *Rape: The Price of Coercive Sexuality* (Women's Press, 1977) cited in Temkin and Krahé, above n 5, 17. See also Liz Kelly, Jo Lovett and Linda Regan, Home Office Research, Development and Statistics Directorate, *A Gap or a Chasm? Attrition in Reported Rape Cases*, Research Study No 293(2005).

⁵⁴⁸ See, eg, Jennifer M Brown, Carys Hamilton and Darragh O'Neill, 'Characteristics Associated with Rape Attrition and the Role Played by Scepticism or Legal Rationality by Investigators and Prosecutors' (2007) 13(4) *Psychology, Crime & Law* 355.

⁵⁴⁹ See, eg, Natasha Marhja, The Lilit Project, *Just Representation? Press Reporting and the Reality of Rape* (2008); Susan Caringella-MacDonald, 'The Relative Visibility of Rape Cases in National Popular Magazines' (1998) 49(1) *Violence Against Women* 62; Lisa Cuklanz, *Rape on Trial: How the Mass Media Construct Legal Reform and Social Change* (University of Pennsylvania Press, 1996). In relation to the influence that the mass media has on juror attitudes see Roger Matthews, Lynn Hancock and Daniel Briggs, Home Office, *Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System: A Study in Six Courts* (2004).

where these beliefs are based on outmoded and discredited ideas about the reality of rape. This could extend to an explanation of the antique, and no longer relevant, roots of these attitudes. They must also be informed that their personal experience of how the issue of consent to sexual activity is negotiated should not distract them from the task of applying the legal test of consent to the facts before them. Even if in their own relationships they are able to accommodate a presumption of continuing consent to a degree, in the legal context there is no place for such a presumption, irrespective of the existence of a prior sexual relationship between the complainant and the accused. Their lay understanding of consent in sexual encounters should not be the determinant of the issue of consent in the trial. It may be that jurors are confident of the correctness of their own views about rape and are unlikely to abandon their beliefs easily, an hypothesis backed by the observation that some of the verdicts reached in the trials in this study were unexpected given the available evidence.⁵⁵⁰ In several trials, the failure to convict where the objective facts of the case virtually precluded the possibility of the existence of consent as it is defined in s 2A of the Code strongly suggests that jurors are reluctant to relinquish doubts about the absence of consent in even the most extreme cases.⁵⁵¹ In Riley's Case, for example, the complainant had endured years of intimidation and violence from her ex-partner and in the lead up to the offences had been very publicly verbally abused by him at her place of work. Despite corroborative evidence that supported both the reasonableness and genuineness of her fear and a lack of evidence of positively communicated consent the jury did not convict.

If it is true that jury attitudes are relatively intractable and that they lag behind the aspirations mapped out in the black-letter law, the explanations that judges and counsel put forward to counteract those prejudices must be both clear and emphatic. The trial presents two main routes for directly fostering attitudinal change—developing a case theory that promotes the aims of the reforms and instructing juries on the concepts of consent and mistaken belief in consent strictly in accordance with the values that underpin the reforms. It is argued that there has been a failure to exploit the possibilities that both these approaches offer and that this largely accounts for the shortcomings in the implementation of the reforms.

⁵⁵⁰ For example, Crown prosecutor in Savage's Case state that he was surprised that the jury acquitted given the very strong performance of the complainant in the witness box. Interview with Crown counsel (Launceston, April 11 2011)

⁵⁵¹ The author is not claiming that this is unquestionably the case. Any rigorous inquiry into the susceptibility of juror prejudices to manipulation or persuasion by the legal actors in the trial would require that interviews be conducted with individual jurors or that transcripts of the content of jury deliberations be available for examination. Either of these courses would present considerable legal and ethical difficulties. In any case this issue is not the focus of the current research.

8.2.1 Constructing the Case Theory

The narrative argument that provides an exposition of the conduct that is the subject of the criminal proceedings is referred to as the case concept or case theory. Research into the cognitive processes involved in juror deliberations suggests that jurors are more likely to accept counsel's assertions of guilt or innocence where the facts of a case are organised into a coherent and internally logical story from the outset. Pennington and Hastie describe this theory as the Story Model of cognitive processing.⁵⁵² The initial case concept that the jury accepts may also be critical to the way that the emerging evidence is filtered and interpreted by jurors.⁵⁵³ Studies have shown that the particular social and cultural milieu that an individual juror inhabits is another significant factor in shaping their understanding of the evidence in rape trials and the significance they attach to particular aspects of the evidence. Kahan contends that, for example,

[t]he question whether the putative victim ... effectively conveyed consent or the lack of it depends on the answer to another question—*who* is being asked.⁵⁵⁴

Kahan's research intersects the fields of law and social psychology and it reveals that culture plays a greater role in influencing juror deliberations than either the legal definition of rape or the gender of the finder of fact considered in isolation.⁵⁵⁵ This is at odds with the normative view of decision making in the criminal justice context according to which unbiased conclusions are reached by the finder of fact based solely on the evidence admissible at trial, and not directed by emotional responses and untested assumptions about victim or offender behaviour.⁵⁵⁶

⁵⁵² Nancy Pennington and Reid Hastie, 'A Cognitive Theory of Juror Decision Making: The Story Model' (1991) 13 *Cardozo Law Review* 519. See also Richard Lempert, 'Telling Tales in Court: Trial Procedure and the Story Model' (1991) 13 *Cardozo Law Review* 559; Warren Young, Neil Cameron and Yvette Tinsley, New Zealand Law Commission, *Juries in Criminal Trials*, Preliminary Paper No 37 (1999); Penny Darbyshire, Andy Maughan and Angus Stewart, 'What Can the English Legal System Learn from Jury Research Published up to 2001?' (2002) (49) *Kingston University Occasional Paper Series*.

⁵⁵³ Young, Cameron and Tinsley, above n 13, 16.

⁵⁵⁴ Dan M Kahan, 'Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases' (2010) 158(3) *University of Pennsylvania Law Review* 729, 733 (emphasis in original). See also Temkin and Krahé, above n 5.

⁵⁵⁵ Kahan, above n 15, 733–4.

⁵⁵⁶ See Neal Feigenson, 'Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It' in Brian H Bornstein and Richard L Weiner (eds), *Emotion and the Law: Psychological Perspectives* (Springer, 2010) 45, 62; Nancy Pennington and Reid Hastie, 'Evidence Evaluation in Complex Decision Making' (1986) 51(2) *Journal of Personality and Social Psychology* 242, 242. Feigenson and Park state: 'judgments of legal responsibility differ from those of moral or ordinary blaming in being circumscribed by rules of substantive and procedural law, including formal burdens of proof and rules of evidence that exclude from consideration matters that judges of responsibility outside the law may consider': Neal Feigenson and Jaihyun Park, 'Emotions and Attributions of Legal Responsibility and Blame: A Research Review' (2006) 30(2) *Law and Human Behaviour* 145.

It is inevitable that jurors' perceptions of the evidence presented to them will be filtered by their unique life experience. Indeed one of the strengths claimed for the jury system is that it introduces into the trial the accumulated wisdom and experience of twelve representatives from the community as a check against the dispassionate and unfettered power of the State.⁵⁵⁷ However, the merits of a case should not be judged by relying on extra-evidential generalisations about the way that sexual relations are conducted. In the following excerpt from summing up to the jury in *Riley's Case* the trial judge explained how jurors' personal experience might properly inform their evaluation of the evidence:

His Honour: Now in going about your task of reaching a decision you may have or not have particular views about the way society operates and about changes in the law and how it's to be applied in social matters and the like, and that's (sic) views which each of you might have and are entitled to have as citizens of our community. But here, you are to determine the case as jurors. So you are to determine this case solely on what you've seen and heard in the form of witnesses and exhibits in this Courtroom. ... But in considering the evidence of what you have heard, making sense of it, separating which parts you accept and which parts you don't accept, you don't work in a vacuum. So you should bring to bear your own commonsense and your own general knowledge of life and of people.⁵⁵⁸

The difficulty with this direction is that it suggests that it is permissible to apply a domestic understanding of consent to the exceptional circumstances of an alleged rape. It does not adequately explain that the scope of the jury's deliberations on the element of absence of consent must be limited by the legal definition of consent, and that considerations that may be appropriate in the context of healthy, consensual sexual relations are not relevant in the sexual offences trial context. In *Riley's Case*, such a direction would have notified jurors that it is not permissible to evaluate the ingredient of absence of consent on the basis of their personal interpretation of the concept. For example, if the legal conception of consent was adhered to, the jury could not find that the complainant's passivity equated with consent, even though their own notion of consent might countenance such a view.⁵⁵⁹

⁵⁵⁷ See, eg, Deane J (in dissent) in *Kingswell v R* (1986) 62 ALR 161, 188: 'The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers'.

⁵⁵⁸ *Riley's Case*.

⁵⁵⁹ In the Canadian case of *R v Douse* [2009] CanLII 34990, Durno J set out elements of trial procedures that are instrumental in communicating the importance of impartiality to the jury. Of the eight elements listed, four directly cautioned against resorting to personal biases and preconceptions in their deliberations. These were:

(i) the juror's oath or affirmation, intended to bind the conscience of the jurors including those who might otherwise be disposed to decide the matter based on assumptions and preconceptions

...

(iv) jury instructions cautioning against resort to preconceptions or biases ... in arriving at their verdict that bring to the surface at a crucial point, the danger of allowing ... biases to influence the verdict,

Temkin and Krahé have also appropriated research techniques from the discipline of social psychology in examining the way that jurors make sense of the evidence that is presented to them. They distinguish between a reasoning process that draws inferences solely from a careful analysis of the admissible evidence, and a process that draws inferences by relying on preconceived expectations of human behaviour. The former is referred to as data-driven information processing and the latter as schematic information processing. Temkin and Krahé argue that the evidence in sexual offences trials is likely to be assessed in the light of jurors' prevailing assumptions about sexual behaviour, that is, schematically, and that this may translate into a failure to convict in the face of otherwise compelling evidence of guilt.⁵⁶⁰

If the Story Model is accepted as an accurate account of the processes involved in juror decision making then opening addresses to the jury present the ideal opportunity to neutralise extralegal juror prejudices. At the outset the prosecution must construct arguments for conviction in a way that alerts the jury to the likelihood that their preconceived ideas will be of little assistance in the determination of guilt or innocence. Shortcomings apparent in the implementation of the reforms can be linked to inadequacies in the way that the prosecution constructs its case theory in the sense that the explanations put forward to persuade the jury of the absence of consent are not couched in terms of the new legislation. The arguments do not rest on evidence of an absence of communicated consent or a failure by the accused to ascertain that consent was forthcoming. Instead, when the individual trials are analysed it becomes clear that case theories that connect with stereotypical assumptions about what constitutes real rape predominate. The major themes identified in chapter 4 are all present in the real rape scenario—force, vigorous resistance by the complainant and victim incapacity—which shows that prosecutors are reacting to anticipated traditional defences rather than probing the amendments for the possibilities they offer to reconceptualise absence of consent. They are failing to direct the attention of the jury to those aspects of the evidence that are critical to a determination of criminal responsibility as stipulated by the new consent provisions, in particular the legislative definition of consent in s 2A of the Criminal Code. Instead, the continued reliance on a pre-reform notion of consent suggests that the

(v) the rules of evidence and process underlining that their verdict depends on the evidence and the law, not upon anyone's personal views,

(vi) jury instructions how to deliberate including not deciding on the basis of their personal, individual views of the evidence and the law and to listen to each juror's views, evaluate their own inclinations in light of those views and the judge's instructions: at [42].

⁵⁶⁰ Temkin and Krahé, above n 5, 2. See also Ziva Kunda, *Social Cognition: Making Sense of People* (MIT Press, 1999); Steffen Bieneck and Barbara Krahé, 'Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?' (2011) 26(9) *Journal of Interpersonal Violence* 1785, 1786.

way the prosecution characterises the evidence in the case is tailored to its understanding of the jury's preconceived views about rape and rape victims.

This is objectionable on a number of grounds. First, by continuing to present cases in a way that does not require jurors to question their assumptions, the prosecution does not leave open the possibility that, as a result of the new statutory definition of consent, the jury might be in a position to find that in a legal sense there was no consent even in cases where, outside of the legal context, their own preconceptions might have encouraged them to find that the complainant had consented. Second, the prosecution's failure to challenge jury misconceptions may act as defacto reinforcement of those misconceptions. If the arguments for an absence of consent continue to align with stereotypical notions about real rape then the jury may be left with the impression that their own preconceptions are a legitimate basis upon which to determine the question of consent. In effect the legal meaning of consent becomes a jury question.⁵⁶¹ It is clear, however, that this is not the correct position under the Code. The Code contains both a statutory definition of consent and a list of conditions that negate consent which in tandem restrict the jury's reliance on a subjective, so-called commonsense understanding of consent. And third, by continuing to focus on evidence of force, resistance and incapacity to construct absence of consent, without reassessing that evidence in the context of the new provisions, the prosecution is ignoring alternative possibilities and failing to engage with the notion of mutual, affirmative consent that the amendments have introduced, and failing to apply the law correctly.

Stereotypical attitudes to rape and sexual assault are particularly problematic in cases that lack features such as violence or assault by a stranger and it is these types of cases that are least likely to be prosecuted successfully.⁵⁶² However, the present research shows that the reforms have not been utilised to enhance the prospects of successful prosecutions in cases where evidence of force or other stereotypical features are absent. It is argued that this is partly due to failings in relation to the prosecution construction of a case theory but the analysis also suggests another explanation, that is, that many in the legal profession are sceptical, not merely that the reforms will bring about changes in

⁵⁶¹ This was the approach adopted in the UK case of *R v Olugboja* [1982] QB 320 where the Court of Appeal stated that the legal meaning of consent was a question of fact for the jury. For critiques of the decision see Simon Gardner, 'Appreciating Olugboja' (1996) 16 *Legal Studies* 275; Catherine Elliott and Claire deThann, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) *Modern Law Review* 225, 236–8.

⁵⁶² See Kelly, Lovett and Regan, above n 8, 72–3; Jeanne Gregory and Sue Lees, 'Attrition in Rape and Sexual Assault Cases' (1996) 36(1) *British Journal of Criminology* 1, 12; Vicki L Smith, 'Prototypes in the Courtroom: Lay Representations of Legal Concepts' (1991) 61(6) *Journal of Personality and Social Psychology* 857 in which the author demonstrates that jurors are more likely to convict where the facts of the case correspond to their understanding of the prototype of an offence.

case outcomes, but that they have effected any significant change in the law at all. This scepticism is perceptible in the way that consent and the defence of mistaken belief in consent continue to be explained to the jury with reference to pre-reform understandings of these concepts.

8.2.2 Explaining the Law to the Jury

8.2.2.1 Definition of Consent

Statutory amendments are not sufficient in themselves to improve the prospects of successfully prosecuting sexual offences. As BenDor observed in relation to the passage of the Michigan Criminal Sexual Conduct Bill in 1974, once legislative change is secured, ‘the real work of reform ha[s] just begun’.⁵⁶³ The changes introduced by the amendments must also be implemented, which requires far-reaching attitudinal change in the community. In a rape trial the community is represented by the members of the jury. The trial therefore presents an opportunity to put the amendments into operation by directly shaping community beliefs. The extent to which the aims can be realised is thus dependent upon the decisions that the trial actors make to implement the changes in practical terms. This is particularly important in relation to cases of non-traditional rape. Jurors are less likely to view non-stereotypical cases as genuine because they do not fit with their preconceptions about the realities of rape.⁵⁶⁴ If such pre-conceptions are to be challenged it is the task of the prosecution to bring these cases, which typically lie outside the jury’s generalised understanding of non-consensual sexual conduct, within the domain of unlawful sexual acts. One mechanism that could be employed is to make greater use of opportunities in addresses to the jury to explain the law and provide concrete examples of situations where prima facie consent is not present. The following is extracted from one of the study trials and it is representative of the sort of limited explanation given to the jury by the prosecution in relation to the ingredient of absence of consent:

The Criminal Code says that ... unless the contrary intention appears, consent in this trial means free agreement. The Code then goes on to say without limiting the meaning of free agreement, a person does not freely agree to an act, we say the

⁵⁶³ J BenDor, ‘Justice after Rape: Legal Reform in Michigan’ in Marcia Walker and Stanley L Brodsky (eds), *Sexual Assault: The Victim and the Rapist* (Lexington Books, 1976) 149, 149.

⁵⁶⁴ Carol Bohmer, ‘Acquaintance Rape and the Law’ in Andrea Parrot and Laurie Bechhofer (eds), *Acquaintance Rape: The Hidden Crime* (Wiley, 1991); Louise Ellison and Vanessa E Munro, ‘Of “Normal” Sex and “Real” Rape: Exploring the Use of Socio-Sexual Scripts in (Mock) Jury Deliberation’ (2009) 18 *Social and Legal Studies* 291.

sexual intercourse, if the person does not say or do anything to communicate consent ...⁵⁶⁵

Such an explanation does nothing to disabuse the jury of their preconceptions and misconceptions about consent to sexual conduct and provides little guidance on how the issue of consent is approached in the legal context. What the prosecution should do is take advantage of the reforms and stress the idea that if the jury is satisfied that the complainant did not freely agree to the sexual acts by giving a positive indication of her consent through words or conduct then they are entitled to find that absence of consent is established.

The analysis of the trials also revealed that in light of the amended consent provisions judicial directions on the element of absence of consent may be inadequate and sometimes plainly wrong. The new provisions represent a fundamental change in the legal conception of consent to sexual conduct and yet a continuing attachment to the previous state of the law was evident in judicial summing up. For example, consent was still explained in terms of capacity, using the language of s 2A as it existed before the amendments:

His Honour: What's consent mean? Well, we can start off - well it means *consent is freely given by a rational and sober person who is ... so situated that they are able to form a rational opinion upon the matter to which the consent is given*. So it involves a person who's rational, not totally disorganized. It obviously wouldn't involve, for the purpose of this, someone sort of totally mentally disabled and has no idea of what's going on ... But it means the giving of a rational and sober person [sic] who is in a position to be able to form a rational opinion of what they're doing, what they're consenting to (emphasis added).⁵⁶⁶

This direction was clearly referencing the previous version of s 2A which read:

In the Code, unless the contrary intention appears, a reference to consent means a reference to a consent which is freely given by a rational and sober person so situated as to be able to form a rational opinion upon the matter to which the consent is given.

This was removed from the definition in the reforms of 2004. Apart from the obvious criticism that his Honour quoted directly from a version of s 2A that is no longer current, this direction also suggested that the question of a victim's capacity to give consent should be the jury's primary focus. This is not the correct approach to the amended s 2A. The legislative definition of consent and the expanded vitiating circumstances indicate that, even in circumstances where the complainant is able to form a rational opinion about whether or not to grant consent, her ostensible consent may be vitiated in other ways.

⁵⁶⁵ McCaffery's Case.

⁵⁶⁶ Riley's Case.

There were also instances where the judge did not refer to free agreement at all. In the following extract the trial judge correctly told the jury that the question of whether the complainant communicated consent is a jury question but that was the extent of his direction on consent. He failed to explain either that consent must amount to free agreement or how free agreement should be understood:

His Honour: Now it's a matter for you as to what amounts to conduct communicating consent.⁵⁶⁷

This direction also gave the jurors licence to judge communication of consent according to their own, extra-legal preconceptions. It does not make any reference to the nature of the communication standard sought to be set by the legislation. More specifically it does not explain that lack of positive communication of agreement establishes absence of consent. Even where there was a reference to free agreement, its absence tended to be illustrated in terms of a lack of capacity:

His Honour: Consent means free agreement, that she freely agreed ... The question is, did she consent, did she freely agree to it? ... And what Parliament has said the law is that it is not free agreement or it's not consent if she is asleep or if she's unconscious or if she's so affected by alcohol or another drug as to be unable to form a rational opinion about the giving of consent.⁵⁶⁸

Repetition and explanation of the repealed and somewhat obscure pre-2004 definition of consent will not assist the jury in applying the amended definition. Instead a more focused explanation of the correct provision is likely to restrict the jury's deliberations to the legal notion of consent. The judge in a criminal trial must always be alert to the danger of apprehended bias and not be seen to be suggesting that the jury favour a particular interpretation of the evidence. However, the trial judge has a duty to explain the law accurately in a manner that makes it possible for the jury to apply the law properly to the evidence. This will involve providing relevant illustrative examples and an explanation of the law in clear, intelligible language. Even in the one case where there was an attempt to engage with the positive consent standard, the various directions given to the jury at different points were contradictory and difficult to understand. His Honour's opening remarks on consent that were erroneously taken from the earlier version of s 2A are extracted above.⁵⁶⁹ Soon after, he expanded on his explanation of the legal notion of consent without acknowledging that he was now referencing the new version or apparently realising that the two directions were fundamentally incompatible. The first suggested that consent was predicated on capacity while the second correctly described the current, more exacting standard of affirmative free agreement:

⁵⁶⁷ Savage's Case.

⁵⁶⁸ Riley's Case.

⁵⁶⁹ See above 206.

His Honour: Parliament is trying to cope with that cultural and I guess social and [sic] debate about the criminal law and it says, ‘well free agreement – well a person is not said to have freely agreed because they didn’t say or do anything, does not say or do anything to communicate consent’. Or for the purpose of the criminal law, there must be some indication communicated from the person to the other that I’m consenting. There must be some yes or I guess mutual love-making, some form of conduct, behaviour, words, nuances especially between two people who know each other intimately over a long period of time where you know things that are happening without having to spell them out.⁵⁷⁰

This is the only instance in all the trials analysed where there was an acknowledgment that jurors’ understanding of rape and victim response to sexual assaults might be at odds with the law’s conception of criminal sexual conduct. Unfortunately, the potentially educative effect of this speech was undermined by the opaque and confused directions that the jury received. Moreover, his Honour later retreated from the assertions about the law he made here.⁵⁷¹ Jurors come to the trial equipped with a naive, extra-legal understanding of rape. If they are to adopt appropriate strategies for deliberating about the evidence, explanations of the law must be accompanied by clear admonitions to revise those previously held erroneous conceptions of rape.⁵⁷²

The responses from the interviews with legal personnel bear out the findings of the analysis of the trial transcripts in this regard. Generally speaking, interviewees indicated that they gave little attention to explaining the legal notion of consent to the jury and distinguishing it from the domestic understanding of the concept. Some interviewees thought that the vitiating circumstances in s 2A helped to clarify the notion of consent and were useful in highlighting the factors that the jury should be focusing on in specific circumstances. However, most respondents considered that little explanation was required, either because the notion of consent was self-evident and jurors did not need assistance to understand the concept, or jurors’ pre-conceived ideas about consent to sexual relations were intractable and no amount of explanation would change them.⁵⁷³ What is also apparent from the interviews, however, is that the commonsense notion of consent that is attributed to jurors is wrongly accepted by some judicial officers as compatible with the definition of consent in s 2A. For example, one interviewee summarised her perception of jurors’ thought processes in cases where there was no evidence that the complainant gave any indication of her state of mind: ‘They’re still going to interpret it as she was consenting *and there was no reason for him to think*

⁵⁷⁰ Riley’s Case.

⁵⁷¹ As noted in chapter 5, when defence counsel challenged the claim that consent must be positively communicated His Honour agreed that this is not what the legislation requires.

⁵⁷² Smith, above n 23, 868–70.

⁵⁷³ Interview with defence counsel (Hobart, 11 October 2010); Interview with defence counsel (Launceston, 11 April 2011); Interview with Crown counsel (Launceston, 11 April 2011); Interview with defence counsel (Telephone interview, 12 July 2011); Interview with Justice of the Supreme Court (Hobart, 8 September 2011).

otherwise'.⁵⁷⁴ This statement suggests that the interviewee accepted that the correct approach to the issue of absence of consent was for jurors to look for evidence of dissent, even though such an approach conflicts directly with the positive consent standard set by s 2A(2)(a).

8.2.2.2 Mistaken Belief in Consent

The other shortcoming in explanations of the law revealed by the transcripts relates to the mistake defence. An honest and reasonable but mistaken belief that the complainant is consenting will absolve the accused of criminal responsibility on the basis of the general defence of honest and reasonable mistake of fact in s 14 of the Criminal Code.⁵⁷⁵

However, there are specific restrictions on its availability in relation to particular sexual offences.⁵⁷⁶ First, the accused's belief must be in consent as defined by s 2A, that is, free agreement. In other words, a belief in consent as legally defined, not a belief in the juror's version of consent. The correctness of this approach was confirmed by the Tasmanian Court of Appeal in *Dalwood*.⁵⁷⁷ An accused is not entitled to the benefit of the defence if he was intoxicated and the mistake was not one which he would have made had he been sober.⁵⁷⁸ Additionally, the mistaken belief will not be exculpatory where the accused is reckless as to the question of consent or fails to take reasonable steps in the circumstances known to him at the time of the offence to ascertain the existence of consent.⁵⁷⁹

It is as yet unclear whether s 14A creates a new legal regime in relation to the defence of honest and reasonable mistake. The trials in this study offer few judicial cues. It may be that it merely emphasises the requirement of reasonableness in relation to the general mistake provision in s 14. The Court of Criminal Appeal held in *Dalwood* that the belief must be in consent as defined in the Code, so a mistaken belief in consent arising from self-induced intoxication, recklessness as to consent or a failure to take reasonable steps to ascertain the existence of consent would always have failed the test of

⁵⁷⁴ Interview with defence counsel (Hobart, 11 October 2010).

⁵⁷⁵ *Criminal Code* (Tas) s 14. Mistake of fact is a defence to a charge of rape, as decided in *Snow v The Queen* [1962] Tas SR 271, and other sexual offences where consent is an element of the offence.

⁵⁷⁶ *Criminal Code* (Tas) s 14A.

⁵⁷⁷ *Dalwood v The Queen* (Unreported, Court of Criminal Appeal Tasmania, Burbury CJ, Crisp and Crawford JJ, 22 December 1967).

⁵⁷⁸ *Criminal Code* (Tas) s 14A(1)(a).

⁵⁷⁹ *Ibid* ss 14A(1)(b)–(c). An almost identical provision exists in s 273.2 of the Canadian Criminal Code. That provision has been criticised by some commentators who argue that adoption of an objective standpoint results in the question of reasonableness being evaluated according to 'the very norms of sexual conduct that result in the commission of sexual offences': Lucinda Vandervort, 'Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault' (2004) 42(4) *Osgoode Hall Law Journal* 625.

reasonableness laid down in s 14. Given that the reasonable steps requirement is modelled on the mistake provision in s 273.2(b) of the Canadian Code, decisions of Canadian courts on point might provide guidance about how it is likely to be interpreted. Although the reasonable steps requirement was heralded by some as a genuine innovation⁵⁸⁰ a recent examination of the jurisprudence of the Supreme Court of Canada and provincial appellate and superior courts identifies ‘clear judicial avoidance of the interpretive task demanded by s 273.2(b)’.⁵⁸¹ Sheehy argues that s 273.2(b) introduces additional considerations into the question of the availability of the defence of mistake and that the air of reality test codified in s 265(4) of the Canadian Code must now accommodate a reasonable steps analysis. She contends that ‘the legal question for the judge charged with determining whether the defence is available must be whether there is an air of reality that the accused took reasonable steps and yet was honestly mistaken as to consent’.⁵⁸² Her observations echo obiter comments of L’Heureux-Dubé J in *Ewanchuk*.⁵⁸³ Her Honour stated that in order for the defence to be put before the jury, there must be an air of reality in respect of both the honest belief and the reasonable steps taken to ascertain consent.⁵⁸⁴ A few provincial appeals court decisions have adopted L’Heureux-Dubé J’s position,⁵⁸⁵ but Sheehy maintains that, generally, the Canadian courts often fail to avert to the reasonable steps requirement and the obligations imposed on an accused to ascertain the existence of consent are not very onerous. The defence is still therefore being left to juries in cases where the accused’s ‘misperception’ of the existence of consent is based on misogynistic assumptions about female sexuality.⁵⁸⁶ What can be said in relation to s 14A, perhaps with some certainty, is that it may assist the jury in their evaluation of the question of reasonableness. One of the judges interviewed for this research considered that the examples in s 14A of intoxication, recklessness and failure to take reasonable steps, were particularly apt in criminal trials. She found that her instructions to the jury on the requirement in s 14 that a mistaken belief in consent must be both honest and reasonable led very naturally into a discussion of the examples of unreasonableness in s 14A.⁵⁸⁷

⁵⁸⁰ Lise Gotell, ‘Canadian Sexual Assault Law: Neoliberalism and the Erosion of Feminist-inspired Law Reforms’ in Clare McGlynn and Vanessa E Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge, 2010) 209.

⁵⁸¹ Elizabeth Sheehy (ed), *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (University of Ottawa Press, 2012) 10 (forthcoming).

⁵⁸² Ibid 15.

⁵⁸³ *R v Ewanchuk* [1999] 1 SCR 330.

⁵⁸⁴ Sheehy, above n 42, 15, citing *R v Ewanchuk* [1999] 1 SCR 330 [100] (L’Heureux-Dubé J).

⁵⁸⁵ *R v Cornejo* (2003) 68 OR (3d) 117 (CA) [2]–[3], [19]; *R v Despina* 2007 SKCA 119 [12], [47].

⁵⁸⁶ Sheehy, above n 42, 39–41.

⁵⁸⁷ Interview with Justice of the Supreme Court (Hobart, 2 September 2011).

In light of the additional, explicit considerations that apply in the context of sexual offences it is incumbent on both the prosecution and the judge in an appropriate case to provide guidance on the operation of the mistake provisions. However, the evidence of the transcripts is that juries receive very little guidance on the defence. Often the relevant provision was read to the jury without further elaboration and in some cases there was no direct reference to s 14A at all. In Allen's Case, for example, his Honour talked about mistake in general terms, without direct reference to s 14 or 14A, and explicitly refrained from providing additional explanation about the mistake defence and the interaction of s 14 with s 14A:

His Honour: I'm not going to try to suggest how a man can possibly get into a situation where he reasonably believes that a woman is consenting to intercourse when she's not. But the law is that if a man has sexual intercourse with a woman without her consent but by mistake honestly and reasonably believed that she was consenting — now that's not rape, or you can't find him guilty of rape.

In other cases judges pointed to evidence that is insufficient as a basis for mistake. In Monoja's Case, for example, the judge suggested to the jury that they might rely on the complainant's actions after the alleged rape as a reasonable basis for the accused's mistaken belief in consent:

His Honour: Certainly on his evidence she acquiesced to his advances and insofar as evidence of what occurred after the event is relevant ... her evidence is that she made no complaint to him, she expressed no resentment or disappointment to him about what had occurred and in fact it seems from what she said and I emphasise what she said, she sat on the bed, took a phone call from her Mum, went to the door and had a hug and a kiss and had earlier said some quite nice things to him. That, of course, is entirely explicable, entirely explicable if she was in fear that she had to do these things in order to get out of that room, that's explicable in terms of her belief. *But it's also relevant to his belief* and that's a matter for you, that's a fact issue for you (emphasis added).

His Honour's direction that the complainant's behaviour *after* sexual intercourse is relevant to the accused's belief in her consent *at the time of* sexual intercourse is clearly incorrect. Her outwardly friendly demeanour might have provided post-coital confirmation to the accused that his earlier belief in consent had been correct but it could not provide an evidentiary foundation for that perception at the time of intercourse. Accordingly it is not relevant to his belief in consent. In Riley's Case his Honour directed that evidence of passivity could satisfy the evidentiary burden in relation to mistake:

His Honour: Or you might be satisfied beyond reasonable doubt that he had sexual intercourse with her without her consent, in which case you've got to consider 4.2.4 separately, because he was mistaken about that, she had not consented, but he honestly and reasonably believed that she was consenting. Why? Because she's passive, she doesn't say no, she doesn't struggle.

This direction amounts to an error in law. Any professed belief in consent must be a belief in consent as defined in s 2A, that is, communicated free agreement. An accused

can no longer rely on passivity as a foundation for his belief since in law passivity is evidence of the absence of consent by virtue of s 2A(2)(a). Moreover, a mistaken belief will not exculpate the accused if the Crown can prove, in accordance with s 14A, that the accused did not take reasonable steps to confirm the existence of consent. Assuming that consent exists merely because the complainant did not struggle amounts to a failure to take any steps to ascertain the existence of consent.

These examples demonstrate that directions from the bench in relation to mistake were often inadequate and at times incorrect. On the other hand, in a few cases, the content of cross-examination of the accused on his efforts to obtain an affirmative ‘yes’ to the proposed sexual conduct provides some evidence that prosecutors recognised that the reasonable steps requirement in s 14A may have introduced additional restrictions on the availability of the mistake defence. For example:

Prosecution Counsel: [Y]ou’d had sexual intercourse I think on the Monday, hadn’t you, in relation — at the same place. Is that right?

Defendant: Yes.

Prosecution Counsel: Right. So is your logic because she consented on the Monday, she was consenting on the Friday? Is that the logic you’re using?

Defendant: No.

Prosecution Counsel: Right. I just wanted to check that. You really didn’t care whether she was consenting or not, did you?

Defendant: Yes. If she didn’t want to have sex, we wouldn’t have had it.

Prosecution Counsel: You didn’t take any steps to understand that in an affirmative sense. That is, you didn’t say to her, look are you happy with this?

Defendant: I can’t understand.

Prosecution Counsel: You just didn’t ask her about it, did you? It just started happening, did it?

Defendant: Yes, it started happening.⁵⁸⁸

And from another case:

Prosecution Counsel: Did you say anything to her — or did she say anything to you to communicate that she was happy with you jumping into bed with her?

Defendant: No, she moved over.

Prosecution Counsel: So she didn’t say anything to you about being happy about you being in there.

Defendant: No.

...

Prosecution Counsel: She didn’t grab you, kiss you back, or anything like that.

Defendant: No.⁵⁸⁹

It is argued however that questions in cross-examination are not sufficient to alert the jury to the correct approach to adopt in applying s 14A in its terms. The responsibility that s 14A places on an accused to confirm the existence of consent, especially in circumstances where the cues are likely to be ambiguous or the accused is aware that the

⁵⁸⁸ Riley’s Case.

⁵⁸⁹ Geeves’ Case.

complainant may be particularly vulnerable, needs to be made more explicit. In particular, there should be a clear judicial statement about the operation of s 14A that offers guidance to trial judges in subsequent cases as well other criminal justice system personnel. It is clear from the interviews that counsel recognise this and prosecutors and defenders alike claim that since the introduction of s 14A the basis for a mistaken belief is afforded more overt attention. This, however, is not borne out by the evidence of the transcripts. One prosecutor accepted that the Crown's practice with respect to mistake needed to be re-evaluated and that, where there is no evidence of reasonable steps, prosecutors could be more assertive in arguing that the defence should not be put before the jury.⁵⁹⁰

Mistaken belief in consent is an issue that is more likely to be raised as part of the prosecution case, if only to persuade the jury that the defence should not succeed. There will be few occasions where the defence team will address the jury specifically in relation to s 14A. In explicitly arguing that the accused was mistaken about the existence of consent, the defence is conceding absence of consent so the defence will rarely be raised independently as the substance of the case.⁵⁹¹ However, on those occasions where some comment is called for, the defence is constrained to justify claims of a mistaken belief in consent in accordance with the correct legal principles. In effect, any evidence that is put forward as a basis for mistake must be sufficient to ground a belief in affirmative free agreement. The jury should be advised that the evidentiary onus that falls on the defence in relation to mistake means that the evidence must be capable of supporting a claim that there were aspects of the complainant's behaviour that induced in the accused a belief that she was consenting and must also be capable of showing that he took reasonable steps to establish that he had permission to proceed. Contrary to counsel's submissions to the judge in the extract below, evidence of past consensual sexual relations does not constitute a sufficient evidentiary basis in this regard:

Defence Counsel: The circumstances known to him were such that he didn't need to, as you might if you hadn't known the lady previously, go into far more detail about a request of sexual intercourse than you would if it's a normal sexual relationship. And if you're married to your partner, I don't go home every night and have her sign a contract or go through a lengthy dissertation about whether she's consenting to sexual intercourse ... But I don't expect you to say this to the jury, but

⁵⁹⁰ Interview with Crown counsel (Hobart, 11 July 2011).

⁵⁹¹ Although the implication that the accused held an honest and reasonable but mistaken belief in consent may be latent in many of the trials and hinted at in examination-in-chief or cross-examination, none of the trials in the present research overtly relied on mistake as the basis of the defence case. It can be argued, however, that given the impossibility of directly apprehending another's subjective mental state, an assertion that the complainant was consenting can only ever amount at best to an assertion of a belief in consent.

what I'm saying is that it's not under s 14A(1)(c) a requirement for positive affirmation or positive steps under that sub-Section either.⁵⁹²

This description of mistaken belief in consent and the specific operation of s 14A failed to acknowledge that the nature of the relationship between the complainant and the accused, characterised as it was by episodes of serious violence and abuse, was relevant to a consideration of the evidentiary basis for the mistake of fact defence. Counsel misrepresented the import of s 14A by suggesting that, due to the existence of a long standing relationship, the accused had no obligation to take positive steps to ascertain the existence of consent. In fact, in these circumstances, nothing short of unambiguous evidence of affirmative consent would suffice to dispel the suggestion that the abusive and intimidatory nature of the relationship prevented the complainant from giving free expression to her sexual wishes. More broadly, the submission sought to re-instate the discredited notion that the accused is entitled to infer the existence of consent based on past consensual sexual encounters. This conclusion is at odds with both the general direction of modern rape law reform, which aspires to provide legal recognition of female sexual autonomy and the particular reforms under scrutiny here, which codify those aspirations in legislative prescriptions of mutuality, communicative sexuality and freely given agreement to specific instances of sexual conduct.

8.3 Additional Concerns

8.3.1 Failure to Address Fluidity in the Notion of 'Consent'

In the opening chapter of this thesis the question was posed whether the old discredited touchstones of relevancy and credibility that inform the stereotypes that shape general understandings about rape are used to interpret the new statutory definition of consent. The analysis of cases in this study suggests that in fact this is what is happening. The legal definition of consent is 'free agreement'.⁵⁹³ Section 2A guides jurors in their deliberations on the issue of absence of consent by listing specific situations where there is no legal consent. However, outside these enumerated instances of non-consent the jury must assess whether they are satisfied that the complainant did not consent by an application of the generic definition of 'free agreement' to the facts. Without further explanation by judges and counsel the risk is that they will draw on their own prejudices and infer consent from evidence that is not legally relevant to the issue. Inasmuch as consent is a legal concept the jury should be instructed on what consent amounts to in law. It is not suggested that the responsibility of determining whether or not consent was

⁵⁹² Riley's Case.

⁵⁹³ *Criminal Code* (Tas) s 2A(1).

absent in the particular circumstances of the case at hand be removed from the jury but, in addition to explaining the meaning of the consent provisions in their terms, there should also be an acknowledgment of the special considerations that arise because of the legal context. Despite the assertions from several interviewees that jurors are competent to evaluate the element of absence of consent without specialised instructions,⁵⁹⁴ at a minimum, addresses to the jury should contain the following additional information:

- Consent is defined in the Criminal Code as ‘free agreement’. This definition is intended to import a standard of mutuality as the gauge by which the existence and legitimacy of consent is to be evaluated.
- You must disregard any preconceptions you might have about consent in the context of sexual relations or the type of behaviour that amounts to a communication of consent if those preconceptions are at odds with the standard of genuine, mutual and freely given agreement that the legislation prescribes.
- Valid consent requires that genuine agreement to engage in sexual conduct is communicated to the other party. The effect of this is that the Crown is entitled to rely on proof that the complainant did not communicate her consent either by words or actions in order to establish the element of absence of consent.
- Even in situations where there is no evidence of violence or threatening behaviour or where the complainant retains the capacity to grant consent there may be other factors at play that impinge upon her freedom to give or withhold valid consent. Therefore, ordinary notions of consent and general understandings of the way that individuals negotiate consensual sexual interactions may be irrelevant to a consideration of whether consent was present in circumstances where there are claims of forced sexual conduct.
- Where the question of a mistaken belief in consent arises an evidentiary onus rests on the accused to point to evidence that is capable of supporting a belief in consent as defined in the Code, that is, a belief that the complainant freely agreed to the particular sexual conduct proposed. This will involve identifying the reasonable steps taken to ascertain the existence of consent.

These brief instructions are an uncomplicated way to begin to address the problems that are evident in the implementation of the reforms.

⁵⁹⁴ Interview with defence counsel (Hobart, 11 October 2010); Interview with defence counsel (Launceston, 11 April 2011); Interview with Justice of the Supreme Court (Hobart, 8 September 2011).

8.3.2 Difficulties with the Positive Consent Standard

The amendments that inserted a statutory definition of consent in s 2A introduced a positive consent standard into the consent provisions in the Code. The rationale behind the insistence on affirmative communication of consent has already been discussed in chapter 1. The legislative stipulation that ‘only yes means yes’ validates a woman’s right to choose or refuse to have sex and it also places responsibility on her partner to seek positive evidence of agreement. It represents a distinct move away from the prevailing phallocentric view of sexual relations towards an egalitarian model where women are acknowledged as sexual beings in their own right and not simply the object of and means to satisfy men’s desires. It also eschews reliance on a doctrine of implied consent since the only inference that can be drawn from silence is an absence of consent. Some commentators have argued that the adoption of a positive consent standard draws the focus at trial away from the actions of the complainant. McSherry offers the following analysis of the principle of communicative sexuality and the potential benefits it offers in the trial context:

Instead of focusing on whether or not the complainant resisted or whether or not she was in a fearful or intimidated state of mind, the way is now open for the prosecution to concentrate on what actions the accused took to ensure that there was free agreement to sexual penetration.⁵⁹⁵

But others do not express the same confidence about the benefits the adoption of a positive consent standard offers for victims. Rumney claims that there is no magic in the communicative model that prevents the complainant’s equivocal behaviour being used to support an inference of consent. He argues that, depending upon the way that consent is constructed by counsel and jurors in the trial, ‘a woman’s behaviour, body and language [may be] used to undermine her claims of non-consent.’⁵⁹⁶ This is due to the fact that the notion of communicated consent itself is inherently ambiguous. Even if jurors are directed, and then accept, that the legislation requires that agreement to engage in sexual conduct be communicated, the type of conduct sufficient to constitute effective communication of consent remains a question that they must resolve on their own. For some jurors, depending on their particular understanding of male/female sexual interactions, being scantily clad, accepting drinks from a man or accompanying him home may be an indication of sexual availability. If this is the mindset with which the complainant’s evidence is evaluated then it will be difficult to convince the juror that she

⁵⁹⁵ Bernadette McSherry, ‘Constructing Lack of Consent’ in Patricia Eastal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 33.

⁵⁹⁶ Philip Rumney, ‘The Review of Sex Offences and Rape Law Reform: Another False Dawn?’ (2001) 64(6) *Modern Law Review* 890, 900.

did not consent and it may seem quite plausible that the accused's belief in her consent was both honest and reasonable.

The findings from this research support Rumney's contention. It seems that the jury standard for communicated consent is not very demanding. It has apparently been met *inter alia* by evidence that the complainant moved over in bed (Geeves' Case), that she accepted a lift home with the defendant (Savage's Case) and that she failed to resist the defendant's overtures with sufficient force (Brennan's Case). In Riley's Case the existence of a prior relationship seems to have dispensed entirely with the requirement that consent be communicated. That jurors readily apprehend the presence of communicated agreement may indicate an uneasiness about convicting an accused even in cases where the lack of evidence of positive consent seemingly compels that conclusion. If they are able to rationalise any conduct of the complainant as a positive indication of consent jurors may feel vindicated in reaching a verdict of not guilty in such circumstances. It may also be that, if members of the jury are pre-disposed to accept that consent can be conveyed by any manner of highly equivocal cues, the reforms have not rendered the prosecution task easier. Jurors may consider that it is unfair to convict if it means imposing a more exacting consent standard than their own upon the accused.

Riley's Case is particularly illuminating in the context of the positive consent standard. This case was discussed in chapter 6 as an illustration of the prosecution's reliance on the use of evidence of force or fear of force to establish absence of consent. Although not framed primarily as a case where consent was not communicated, Riley's Case is important because it is a classic example of s 2A being misunderstood and misinterpreted. Admittedly, there are features of the case that perhaps made for a poor prospect of conviction. The parties had been in a long-term relationship, there was undisputed evidence of consensual sexual intercourse in the days before the alleged rape and there was no evidence of manifest dissent from the complainant. However, for these reasons, it was just the sort of marginal case that the amendments to s 2A were directed at. The trial judge suggested as much in discussions with counsel about the aspects of the law he proposed to address in summing up to the jury.

His Honour: And I think it may be one of the first cases in Tasmania where (2)(a) and the amendments have real work to do.

The real force of s 2A(2)(a) is the direct correlation it creates between passivity and absence of consent. Unfortunately, his Honour was not prepared ultimately to give effect to the full implications of this provision. Had the jury had been properly instructed that they were entitled to be satisfied about the element of absence of consent if they were convinced beyond reasonable doubt that the complainant did not communicate by words

or conduct that she was consenting, then the outcome of this case may have been different.

The prosecution has the responsibility, therefore, where absence of communication is a live issue, to mark out the legitimate scope of conduct that may be indicative of consent by reminding the jury that their deliberations must be informed by the ideals promoted by the legislation. Thus, reasonable doubts about absence of consent may be supported by evidence of expressions of autonomous sexual desires but should not be grounded in evidence of resigned or fearful submission. McSherry, quoted above,⁵⁹⁷ asserts that prosecutors can now exploit the communicative model of consent to explore in cross-examination how the accused established that the complainant was a willing participant. Questions about whether, for example, they discussed the issue of contraception, whether they talked about different sexual positions or what indications of enjoyment the complainant gave are undoubtedly relevant in trying to determine the issue of communicated consent. However, the reality is that the Crown will not have the opportunity to cross-examine where an accused chooses to exercise his right to silence. In the selection of trials in this research fewer than half the accused took the stand. Hence, where the possibility of cross-examination does not arise, the prosecution must enlist other strategies to adduce evidence that no consent was communicated, chiefly the effective examination-in-chief of the complainant. Since the element of absence of consent will be made out if the jury is satisfied beyond reasonable doubt that consent was not positively communicated, evidence that will assist the jury in this regard is evidence that demonstrates the absence of communicated agreement. Therefore, questions put to the complainant in examination-in-chief should be designed to disclose, not just that non-consent was communicated, but also that there was an absence of communicated agreement. The prosecution has a responsibility to ensure that jurors comprehend this critical distinction. The jury must be apprised, in language that they can understand, of the impact that the adoption of a positive consent model has upon their deliberations. In a legal sense the question of whether or not the complainant expressed her dissent is not determinative of the consent issue, although where such evidence exists it may form part of the factual matrix that constructs a convincing representation of non-consensual activity. The jury's central concern must be whether the evidence convinces them that she did not express free agreement to engage in sexual conduct with the accused.

It is argued above that heterosexual norms foster prejudicial assumptions about female sexuality and that therefore claims of forced sex are likely to be received with scepticism. Often, only evidence of vigorous resistance, serious injury to the complainant

⁵⁹⁷ McSherry, above n 56.

or perhaps victim incapacity will overcome this scepticism. But in the majority of rape cases, so-called non-stereotypical or acquaintance rapes, such evidence will be unavailable. It is in these cases that the affirmative model of consent may be most effective. It offers the opportunity to explain that consent must be positively manifested and cannot be presumed, for example on the basis of a pre-existing sexual relationship or the complainant's allegedly promiscuous behaviours. Reasonable doubt about absence of consent will only arise where the prosecution fails to prove that the complainant did not communicate her willing agreement to engage in the sexual activity. The point must be stressed that mutual, positively communicated free agreement marks out the domain of legal (adult) sexual activity whether the case involves a traditional 'stranger' rape, an acquaintance rape or an incident of sex between long-term partners.

8.3.3 Opaque Jury Instructions

At various stages in the trial process the jury receives instruction on their function and responsibilities. In the course of opening addresses prosecution counsel will usually explain the law governing the offences charged but the conclusive statement of the legal framework within which the jury is to evaluate the evidence is provided by the trial judge in summing up. It is the practice in the Tasmanian Supreme Court to supplement the judge's comments with a written aide memoire outlining the charges faced by the accused and summarising the relevant legal considerations. The wording of oral instructions and written memoranda calls for great precision. As explained in the report of a study of criminal jury trials conducted in New South Wales:

A trial judge is caught between the demands of formulating directions regarding legal concepts that a jury of laypersons can understand while adhering to strict doctrinal requirements to ensure that there is no basis for an appeal on the ground of inadequate or incorrect directions.⁵⁹⁸

The spare and ritualistic formulation of instructions evident in the research data suggests that the goal of a well-crafted, unimpeachable statement of the law is pursued at the expense of effective communication with the jury. Unfortunately, the legal jargon employed in jury explanations may be baffling to the lay audience in the court room. It is essential that addresses to the jury are formulated in clear, accessible language. Misunderstandings about the law and the legal implications of evidence may encourage juror reliance on extra-evidential considerations in making decisions, including their own

⁵⁹⁸ Michael Chesterman, Janet Chan and Shelley Hampton, Law and Justice Foundation of New South Wales, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) 176.

generalised understandings of sexual interactions.⁵⁹⁹ This research has revealed instances where the trial judge's summing up to the jury was difficult to comprehend for a legal audience and must have been barely intelligible to the lay jurors. Although there is a lack of empirical research with real juries⁶⁰⁰ it seems safe to assume that jurors may struggle to understand instructions formulated in abstruse legal language.

In an effort to provide consistency at least, many jurisdictions have embraced the use of trial bench books. These are intended to guard against judicial error in summing up by recommending standard directions in relation to the elements of the offence to be proved and any particular evidential issues that arise. Standardised, jurisdiction-specific bench books have not been developed in Tasmania. Judges tend to formulate their own jury instructions which are closely tied to the local legislative provisions. They also consult bench books from other jurisdictions, although these may not be directly transferable to the Tasmanian context, and have access to the specimen directions of fellow judges and the Chief Justice of the Supreme Court of Tasmania.⁶⁰¹ New South Wales led the way in developing bench books for the judiciary and at least since 2002 electronic versions of these have been publicly available. The Criminal Trials Court Bench Book contains standard directions on consent in sexual offences cases and the Equality Before the Law Bench Book addresses the importance of preventing stereotypical assumptions from unfairly influencing the jury's deliberations.⁶⁰² Necessarily composed in the abstract, bench book directions are not tailored to the factual circumstances of a given case. Accordingly, jurors may still struggle to understand how the directions relate to the evidence that they have heard at trial. While there is a cogent argument in support of model instructions on consent and the mistake defence, achieving

⁵⁹⁹ A comprehensive overview of the literature on research into juror comprehension of judicial directions is provided in Darbyshire, Maughan and Stewart, above n 13. This research paper was commissioned for the Auld Review: Sir Robin Auld, Chancellor's Department (London), *Review of the Criminal Courts of England and Wales* (2001).

⁶⁰⁰ The Arizona Jury Project, in which researchers were granted permission to videotape the deliberations of actual juries in fifty civil trials, is a notable exception. See Shari Seidman Diamond et al, 'Juror Discussions During Civil Trials: Studying an Arizona Innovation' (2003) 45 *Arizona Law Review* 1. Access to the content of jury deliberations is normally prohibited by common law contempt of court rules or statutory bars. See, for example, *Juries Act 2003* (Tas) s 58. Therefore most jury research has been conducted with mock juries or by administering questionnaires of limited scope after the conclusion of a trial. See, eg, Ellison and Munro, above n 25; Ellison and Munro, above n 5; Louise Ellison and Vanessa E Munro, 'Turning Mirrors Into Windows?: Assessing the Impact of (Mock) Juror Education in Rape Trials' (2009) 49(3) *British Journal of Criminology* 363; Justice G Eames, 'Towards a Better Direction — Better Communication with Jurors' (2003) 24 *Australian Bar Review* 35; Chesterman, Chan and Hampton, above n 59; Young, Cameron and Tinsley, above n 13.

⁶⁰¹ Interview with Justice of the Supreme Court of Tasmania (Hobart, 2 September 2011).

⁶⁰² Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (June 2011) <<http://www.judcom.nsw.gov.au/publications/benchbks/criminal>>; Judicial Commission of New South Wales, *Equality before the Law Bench Book* (2010-2011) <<http://www.judcom.nsw.gov.au/publications/benchbks/equality>>.

consistency in instructions is only part of the solution to the problem of juror comprehension. Instead, an holistic approach is called for which addresses the three major aspects of the problem: the language used in instructions; the timing of instructions; and the medium by which instructions are delivered. Where solutions are proposed these should accommodate the findings of psycholinguistic research into how juries deliberate and how they make sense of the information they are given.⁶⁰³

One approach may be to provide juries with question trails to assist in their deliberations. Question trails are used in New Zealand and their use has also been advocated in the United Kingdom.⁶⁰⁴ Jurors are provided with a document that reduces the issues to be determined to a series of questions about the facts they have found. Their ‘yes’ or ‘no’ answers to each question direct them to an ultimate decision about the accused’s guilt or innocence.⁶⁰⁵ The document is drafted in layperson’s terms so the difficulties of technical legal jargon are largely avoided and, unlike oral instructions, it has the advantage of being available as a reference source throughout the period of deliberation.⁶⁰⁶ There may also be merit in summarising aspects of the case in the form of a flow chart or a series of questions at different stages of the trial, and not just at the conclusion, since there is evidence that judicial instruction given early in proceedings will aid understanding and can have an appreciable influence in confining jurors to a consideration of the evidence in its legal context.⁶⁰⁷ In his support of staged summaries Lord Justice Moses declares:

No guide, worthy of the name, disappears into the fog and leaves his duties till he has reached the summit when he then attempts to shine a wan lamp through the mist to the weary traveller far below.⁶⁰⁸

The way that the current research was conducted did not include consideration of the question of how well jurors understand the instructions they receive in the course of a trial. The ritualistic format of many explanations suggested that the issue was not a dominant concern for legal officers. It is suggested that it should be. It is noted that the

⁶⁰³ See, eg, the studies cited in Darbyshire, Maughan and Stewart, above n 13, 26.

⁶⁰⁴ Sir Robin Auld, above n 60, 538; Lord Justice Moses, ‘Summing down the Summing-up’ (Paper presented at the Annual Law Reform Lecture, The Hall, Inner Temple, London, 23 November 2010) 9–11.

⁶⁰⁵ See Victorian Law Reform Commission, *Jury Directions*, Final Report No 17 (2009). Appendix E reproduces examples of jury question trails prepared by Justice Chambers of the New Zealand Court of Appeal.

⁶⁰⁶ Question trails are not without their critics. One of the interviewees in this project expressed concern that they might be a source of juror confusion since juries might be directed to consider issues that did not arise on the facts of a particular case: Interview with Justice of the Supreme Court of Tasmania (Hobart, 2 September 2011).

⁶⁰⁷ G Bollingmo et al, ‘The Effect of Biased and Non-Biased Information on Judgments of Witness Credibility’ (2009) 15(1) *Psychology Crime & Law* 61.

⁶⁰⁸ Lord Justice Moses, above n 65, 8.

Australian Law Reform Commission has recognised the importance of this issue and has recommended that a targeted inquiry into jury directions be conducted.⁶⁰⁹

8.4 Further Proposals for Improving the Implementation of the Reforms

This chapter argues that the manifestation at trial of social and cultural understandings about rape, genuine victim behaviour and sexual interactions between men and women in general remains as the major barrier to implementing rape law reform. It would seem that education for greater awareness of the realities of rape is key to tackling both the negative impacts that stereotypical assumptions about rape have on rape trials as well as engineering a decrease in the incidence of sexual assault. The present research reveals that the biases that infect many jurors may also be detected in the attitudes of some legal officers. Since the manifestation of these prejudices in the trial setting critically influences the way that the concept of consent is illuminated for the jury, education about the aims of the reforms as well as the realities of rape and sexual assault should be provided to those who work in the criminal justice system as an urgent priority. Implementing change at the interface between the legal system and the general public will help to engender the sort of community-wide attitudinal change that is critical to effective law reform. The final section of this chapter examines the proposal that more extensive and formalised criminal justice training should be offered and also sets out some further initiatives for improving the way that the reforms to the consent provisions in the Criminal Code, and indeed legislative reforms more generally, are implemented.

The contention that the rape of women by men is sanctioned and sustained by patriarchal social structures enjoys wide support in the academic literature.⁶¹⁰ This

⁶⁰⁹ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) [18.5]. The comprehensive cross-jurisdictional analysis recommended by the ALRC has not yet eventuated. Jury directions in the context of rules of evidence are examined in the ALRC's report on the *Uniform Evidence Law*, Report No 102 (2006) and directions relating to sexual offences are examined in the Commission's report on Family Violence: Australian Law Reform Commission, *Family Violence - A National Legal Response*, Report No 114 (2010). The Victorian and Queensland law reform commissions have completed reviews into jury directions and warnings in criminal trials: Victorian Law Reform Commission, above n 66; Queensland Law Reform Commission, *A Review of Jury Directions*, Report No 66 (2009). The New South Wales Law Reform Commission is currently conducting an inquiry into jury directions in criminal trials. A consultation paper was released in December 2008: New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper No 4 (2008).

⁶¹⁰ See, eg, Ellison and Munro, above n 25; Irina Anderson, Kathy Doherty and Jane Ussher, *Accounting for Rape: Psychology, Feminism and Discourse Analysis in the Study of Sexual Violence* (Routledge, 2008); Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, 2005); Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) especially ch 2. Heath and Naffine have suggested that '[t]he chances of a woman seeing her rapist convicted in court are negligible and thus the very presence of a rape law on the books is

account normalises male sexual aggression and female submission. It does not conceive of women actively desiring or taking pleasure in sex,⁶¹¹ but regards male sexual conquest as a measure of masculinity. Gender norms, virtually unchanged since the Middle Ages, credit women with responsibility for arousing sexual desire in men and simultaneously absolve men from failure to exercise sexual self-control. Thus women are cast as ‘the “gatekeepers” of male sexual impulse’.⁶¹² The effects of these social and sexual norms are keenly felt in the area of sexual offences law. The patriarchal model of sexual relations re-interprets female resistance to sexual overtures as a calculated manipulation to increase male sexual arousal; female submission is equated with positive consent since women are constrained by their prescribed social role not to communicate sexual desire directly; and claims of forced sex are disbelieved because women are believed to be naturally scheming and dissimulative.⁶¹³ These claims resonate with the historical understanding of female sexuality described in chapter 2 and attest to its continued acceptance in modern times. Moreover, as Anderson and Doherty assert, even if claims of forced intercourse are believed, the victim may still be blamed for engaging in risky behaviour or otherwise failing to avoid the assault.⁶¹⁴ Studies have shown that acceptance of this gendered, discriminatory model of sexual relations influences the assessment of the blameworthiness of both victims and perpetrators in rape cases.⁶¹⁵ In a survey of young men’s attitudes to rape conducted by Family Planning South Australia almost one-third of respondents (31.7%) agreed that it was justifiable to force a girl to have sex in some circumstances.⁶¹⁶ A more recent poll commissioned by the Havens Sexual Assault Referral Centres in London revealed that 56% of those surveyed believed that in some circumstances the victim should take responsibility for being raped and 18% of

fraudulent to women.’: M Heath and N Naffine, ‘Men’s Needs and Women’s Desires: Feminist Dilemmas about Rape Law Reform’ (1994) 3 *Australian Feminist Law Journal* 30, 51.

⁶¹¹ Anderson, Doherty and Ussher, above n 71, 127.

⁶¹² Ibid 8.

⁶¹³ Ibid 6–7.

⁶¹⁴ Ibid 8. Lise Gotell contends that the prototype ideal victim is now likely to be risk-adverse and responsible rather than, as was the case traditionally, chaste and virtuous: Lise Gotell, ‘Rethinking Affirmative Consent in Canadian Law: Neoliberal Sexual Subjects and Risky Women’ (2008) 41 *Akron Law Review* 865, 878–80.

⁶¹⁵ See, eg, Tarnya Davis and Christina Lee, ‘Sexual Assault: Myths and Stereotypes Among Australian Adolescents’ (1996) 34(11) *Sex Roles* 787; Steve Golding and Brook Friedman, ‘Guys Talk Too: Improving Young Men’s Sexual Health — Report of the Young Men and Acquaintance Rape Survey’ (Family Planning South Australia, 1997); Amnesty International UK, *Sexual Assault Summary Report* (12 October 2005) <http://www.amnesty.org.uk/uploads/documents/doc_16619.doc>; The Havens (Sexual Assault Referral Centres), *Wake up to Rape Research: Summary Report* (2010) <http://www.thehavens.co.uk/docs/Havens_Wake_Up_To_Rape_Report_Summary.pdf>; Bieneck and Krahé, above n 21.

⁶¹⁶ Golding and Friedman, above n 76.

respondents agreed with the statement, ‘most claims of rape are probably not true’.⁶¹⁷ Again, these beliefs find their counterpart in mediaeval attitudes towards rape that were examined in chapter 2. Clearly attitudes such as these present a real obstacle to conviction when they emerge in sexual offence trials, but the magnitude of the problem should not discourage attempts to effect change. As Heath and Naffine observe:

To abandon the attempt to create a law of rape that might be useful for women is to abandon women to the rapists and to leave law reform in the hands of the state when it has been well established that the state does not work in [their] best interests.⁶¹⁸

8.4.1 Criminal Justice Training

Members of the criminal justice community have the greatest influence on the progress of sexual offences matters within the criminal justice system. They also engage directly with jury members and in that way have the ability to influence the formation of public attitudes more generally. Therefore it is vital that they receive appropriate training, not just about the content of new and amended legislation but also about its aims and the context in which it was instituted. The positive effects of increased training for police officers in responding to complaints of sexual assault which were identified in the evaluation reports on the 1981 amendments to the rape laws in New South Wales support this position.⁶¹⁹ This education should be both systematic and compulsory. It should cover current research in the field of rape and sexual assault, the social and criminological aspects of sexual offences as well as the procedural and substantive aspects of sexual offences law. It should also be compulsory for all those legal officers materially affected by the changes to the law, that is, members of the judiciary, Crown prosecutors and defence barristers. In the absence of education legal personnel may act in ignorance of the true import of the reforms, and rely upon the collective understanding of peers and customary practices with the result that they fail to apply the law. In Tasmania at least, this seems to be the accepted practice. A senior Crown prosecutor, in response to questions about what training is offered in respect of legislation replied: ‘We exchange views, talk about cases we’ve had and assist each other so we get ongoing training that way.’⁶²⁰

⁶¹⁷ The Havens, above n 76. A comparable finding in a survey conducted by VicHealth was that 26% of respondents disagreed that ‘women rarely make false claims of being raped’: Victorian Health Promotion Foundation (VicHealth), *National Survey on Community Attitudes to Violence Against Women* (2009) 8.

⁶¹⁸ Heath and Naffine, above n 71, 51.

⁶¹⁹ Roseanne Bonney, NSW Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation: Interim Report No 1* (1985) 11–12; Bonney, Roseanne, NSW Bureau of Crime Statistics and Research, *Crimes (Sexual Assault) Amendment Act 1981: Monitoring and Evaluation: Interim Report No 2* (1985) 63.

⁶²⁰ Interview with Crown prosecutor (Hobart, 11 July 2011).

There are initiatives in some jurisdictions that boast success in expanding judicial awareness of the inherently discriminatory nature of the criminal justice system's response to victims of sexual assault. In the United States the National Judicial Education Program offers a wide range of training resources to promote judicial understanding of gender bias within the courts.⁶²¹ In Canada the National Judicial Institute promotes education for the judiciary in the three areas of substantive law, skills training and social context awareness training.⁶²² In the United Kingdom the Judicial College, an independent judicial body supported and funded by the Ministry of Justice, is responsible for training judicial officers.⁶²³ Attendance at one national seminar per year is mandatory and all judges who are 'ticketed' to preside over serious sexual assault cases are required to attend sexual assault seminars convened by the Judicial College. In Australia a number of institutions offer judicial education in various formats. These include the National Judicial College of Australia, the Australasian Institute of Judicial Administration, the Judicial Conference of Australia, the Judicial Commission of New South Wales and the Judicial College of Victoria. The first three, the National Judicial College of Australia, the Australasian Institute of Judicial Administration and the Judicial Conference of Australia, offer professional development programmes to members of the judiciary nation-wide.

Criticisms of judicial training programs such as these generally tend to converge around two main arguments. The first is the traditional argument that any extension to judicial training that attempts to direct the decision-making processes of individual members of the judiciary, other than guidance about strictly legal considerations, impermissibly interferes with judicial independence. Such claims would appear to be no longer widely endorsed. The former Chief Justice of the High Court of Australia has said:

Judicial education is no longer seen as requiring justification. We are past the stage of arguing about whether there should be formal arrangements for orientation and instruction of newly appointed judges and magistrates, and for their continuing education.⁶²⁴

The other is that these initiatives amount to no more than window-dressing and that they do not translate into tangible improvements in judicial attitudes. In an address to the Annual Conference of the Continuing Legal Education Association of Australasia, the then Chief Justice of the Supreme Court of Tasmania criticised the limited extent of ongoing judicial training available in Australia. He argued that real improvements in

⁶²¹ Legal Momentum, *National Judicial Education Program: A Right to Justice for Victims* (2009) <<http://www.legalmomentum.org/our-work/vaw/njep.html>>.

⁶²² National Judicial Institute <<http://www.nji-inm.ca/nji/inm/accueil-home.cfm?lang=en&>>.

⁶²³ This work was formerly the preserve of the Judicial Studies Board.

⁶²⁴ Murray Gleeson, 'The Future of Judicial Education' (1999) 11(1) *Judicial Officers' Bulletin* 11.

awareness about the realities of rape required a level of engagement with the problem that mere attendance at seminars and conferences could not offer.⁶²⁵ This thesis argues that compulsory training should be provided for judges and that that training should extend beyond coverage of the substantive and procedural aspects of the law. There should also be a focus on the social context and the underlying theoretical basis underpinning new laws, particularly, as here, where the subject of study is a raft of legislation that enacts fundamental changes to the principles by which the law is to be interpreted. If such training is to do more than simply offer lip service to the truly herculean task of radically changing legal and social attitudes to the crimes of rape and sexual assault then it is critical that questions about the content and delivery of such training, who should develop and evaluate the content, how outcomes are to be assessed and how such initiatives are to be funded must be addressed as a matter of priority. More extensive consideration of the merits of these proposals is beyond the scope of this thesis but it is clear that there is an urgent need for programmes that give due weight to the importance of the social context of rape and sexual assault as a necessary aspect of judicial training.

The same arguments can be made that there is a need for a systematic approach to the training of Crown prosecutors. In the United Kingdom, for example, the Crown Prosecution Service has established a network of rape specialist prosecutors to ensure that rape cases are handled by legal officers with expertise in the prosecution of sexual offences.⁶²⁶ These prosecutors are required to undertake additional training in the substantive and procedural aspects of the law as well as specific instruction on the provisions of the *Sexual Offences Act 2003* (UK). Training is also provided in relation to the impact of rape myths on the prosecution of sexual offences.⁶²⁷ At present the Director of Public Prosecutions in Tasmania does not support a specialist sexual offences unit although there has been one in the past.⁶²⁸ Serious sexual offences cases, such as rape or child sexual offences are handled by senior prosecutors but otherwise the caseload is distributed throughout the department. When new legislation is enacted generally a memorandum is distributed to legal officers outlining its purposes and aims but beyond

⁶²⁵ Peter Underwood, 'Educating Judges –What Do We Need?' (2006) 7(4) *Judicial Review* 423.

⁶²⁶ Crown Prosecution Service, *CPS Policy for Prosecuting Cases of Rape* (March 2009) [3.5]–[3.9]; Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims. Justice for Victims of Rape. A Consultation Paper* (2006) <<http://www.homeoffice.gov.uk/documents/cons-290306-justice-rape-victims?view=binary>>. A comparable Specialist Sex Offences Unit exists within the crown prosecutor's office in Victoria.

⁶²⁷ Temkin and Krahé, above n 5, 193–4.

⁶²⁸ Interview with senior prosecutor (Office of the Tasmanian Director of Public Prosecutions, 11 July 2011).

that no formal or ongoing training is offered.⁶²⁹ The handling of sexual offences matters is specialised in one sense in that responsibility for advising police of the prospects of conviction in sexual offences cases rests solely with two senior prosecutors.⁶³⁰ This advice is critical to decisions about whether or not to prefer charges and therefore it is imperative that it is formulated in full awareness of the possibilities that the amended legislation offers for expanding the types of cases that are worth pursuing. Some form of structured training must be offered to prosecutors if more incidents of sexual assault are to be brought within the scope of prosecution in the first instance and if they are then to be prosecuted in accordance with the more expansive amended Code provisions that now apply.⁶³¹

The reformers' aims may remain unrealised where the amendments are left to be administered by legal officers who have not received appropriate training. These officers include those defending rape cases. Though they are not tasked with the responsibility of delineating the concept of consent in sexual relations or explaining the law in relation to mistake in the same way that prosecutors and judges are, there are moral and legal imperatives for insisting that defence counsel practise in accordance with both the spirit and the letter of the law. It is indisputable that, as Temkin and Krahé observe, '[r]eliance on the myths and stereotypes surrounding rape should be as unacceptable for defence barristers as are the myths and stereotypes of race'⁶³² yet beyond such moral objections there are also important legal justifications for extending training to defence barristers. Lawyers owe a duty to their clients which, in a sexual offence case may involve attacking the complainant's character in order to impugn her standing as a credible witness against the accused. But lawyers also owe an over-riding duty to the administration of justice and in honouring this they must not knowingly misrepresent the state of the law. If they suggest that a complainant was consenting because she failed to offer resistance then this is a misstatement of the law. If they suggest that the accused believed she was consenting because she had never objected before, this too misstates the law. If they subject the complainant to hostile cross-examination and imply that she is a slut or a liar, or that she was complicit in her own rape, matters that should be irrelevant to the issue of consent are accorded unwarranted significance in the determination of that element of the

⁶²⁹ Ibid.

⁶³⁰ Ibid.

⁶³¹ The question of whether the amendments have facilitated the prosecution of a broader range of cases has not received detailed consideration in this thesis. The fact that the trials analysed for this research were prosecuted in accordance with pre-reform constructions of absence of consent suggests that this may not be happening. In an interview with a Crown prosecutor he stated that he did not think that cases were currently being prosecuted that would not have been prosecuted before the reforms: Interview with Crown counsel (Launceston, 11 April 2011).

⁶³² Temkin and Krahé, above n 5, 194.

offence.⁶³³ In the trials that were the subject of this research there is evidence that defence counsel do endeavour to undermine the complainant's credibility in these ways. In Savage's Case, for example, counsel exploited the myth about delayed complaint to substantiate the suggestion that the allegation of rape was false. The defence argued that the complainant made a report to police, long after the incident, only because she was ashamed that she had become the object of gossip and because she discovered that she had contracted a sexually transmitted infection:

Defence Counsel: I'm going to suggest that you've been placed under pressure by people to report this, you're concerned about your reputation and it was as a result of all those sorts of pressures that you've finally gone to the police five weeks later?

This explanation for her decision to bring a complaint was contradicted by separate prosecution witnesses who testified that the complainant had contacted them immediately after the events, well before she was aware that she had contracted an infection, in great distress claiming that she had been raped. It may be that in this case, given that the accused was ultimately acquitted, invocation of the myth of delayed complaint encouraged the jury to doubt the complainant's account.⁶³⁴ The ramifications of the nightmare of cross-examination are also experienced beyond the individual trial context. There is evidence that the humiliating ordeal that cross-examination represents for some rape complainants may be a real disincentive to pursue a complaint.⁶³⁵

Rape shield laws have been introduced in many jurisdictions in an effort to quarantine the complainant's sexual history and sexual reputation from cross-examination.⁶³⁶ However, in practice, studies have shown that these are often not complied with.⁶³⁷ In this study, complainants' sexual history, whether with the accused or

⁶³³ Though not legally relevant to consent, the complainant's character is impugned in this way so that the issue for the jury becomes 'not so much, "did he rape her" but, is she "rapeable" and thus "do we want to convict this man of rape?"': Anderson, Doherty and Ussher, above n 71, 19. By recasting the central jury concern in these terms, the defence is able to exploit the stereotypes about female sexuality that disqualify the complainant's account of violation.

⁶³⁴ In an interview with the author, prosecution counsel expressed amazement that the accused was acquitted in this case. According to counsel the complainant was a very credible witness: Interview with Crown counsel (Launceston, April 11 2011).

⁶³⁵ See, eg, Michele Burman, 'Evidencing Sexual Assault: Women in the Witness Box' (2009) 56(4) *Probation Journal* 379; Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219.

⁶³⁶ For example, all Australian states and territories have introduced rape shield legislation: *Crimes Act 1914* (Cth) ss 15YB–YC; *Criminal Procedure Act 1986* (NSW) s 293; *Evidence Act 2001* (Tas) s 194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 48–53; *Evidence Act 1929* (SA) s 34I; *Evidence Act 1958* (Vic) s 37A; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) ss 36A–BC; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

⁶³⁷ See Anderson, Doherty and Ussher, above n 71; Terese Henning and Simon Bronitt, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in Patricia Eastaugh (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (Federation Press, 1998) 90–1.

with other men, her alcohol and drug habits and the type of work she did were all raised to suggest that she was not deserving of the court's protection. In Lincoln's Case, for example, the complainant was cross-examined about working as an exotic dancer (for which read stripper). Once this fact was established counsel attempted to trivialise the alleged sexual assaults by insinuating that the complainant was inured to sexual advances from men because of her chosen lifestyle.⁶³⁸ Such evidence should be irrelevant and therefore inadmissible. The fact that it isn't excluded shows that merely having shield provisions in place is not sufficient. If the court experience is to be improved for victims of sexual assault, all the court actors must be educated that such material is generally irrelevant to a determination of issues of consent and that, if admission is sought, counsel will be obliged to establish relevance other than on the basis of prejudicial assumptions about female sexuality and behaviour.

8.4.1.1 Human Rights Implications

Objections to the way prejudicial stereotypes are invoked against complainants acquire even more force when their implications for the protection of human rights are considered. In the criminal law context the discussion of human rights implications is largely 'defendant-centric'.⁶³⁹ However, it is legitimate to ask, when assessing the fairness of substantive or procedural aspects of the law, whose human rights warrant protection? Even though the rights of the individual accused in defending serious criminal charges against the vast resources of the state are of primary importance, recent case law and human rights commentary has suggested that the right to a fair trial is not limited to the accused.⁶⁴⁰ The triangulation of interests of the accused, the victim and the

⁶³⁸ The following exchange occurred during cross-examination of the complainant:

Defence Counsel: And you gave some evidence that Mr Lincoln said he was aware that you were an exotic dancer, correct?

Complainant: Yes.

Defence Counsel: Was that in fact the case, you were an exotic dancer?

Complainant: Yes,

...

Defence Counsel: [Y]ou keep getting back into the car with him after these lewd sexual suggestions, the groping, the indecent assaults. They happen and you just get back into the car?

Complainant: Yes. If he'd tried to rape me I would have assaulted him myself.

Defence Counsel: Oh, but indecently assaulting you was fine, was it — you were quite happy with these assaults were you, is that your evidence/

...

Defence Counsel: You were happy about this, were you, you just — it was water off a duck's back to you?

⁶³⁹ Jeremy Gans et al, *Criminal Process and Human Rights* (Federation Press, 2011) 380.

⁶⁴⁰ Fundamental questions about how to define fairness or what the essential elements of a fair trial are, are beyond the scope of this thesis. The debate about whether an accused's fundamental fair trial rights can ever be subject to compromise is also not covered here. For a useful summary of the scope of the right to a fair trial see Gans et al, above n 100, ch 9. For a critique of the

public may require a refocusing of rights.⁶⁴¹ Agitation for the recognition of a triangulation of interests, where rights protection is also afforded to vulnerable witnesses, was mobilised principally by feminist activists of the 1990s.⁶⁴² The results can be seen in the passage of legislation authorising protective measures for vulnerable witnesses in court,⁶⁴³ provision, as an exception to the hearsay rule, for fearful witnesses to rely on previous statements rather than being forced to give evidence in court⁶⁴⁴ and rape shield legislation which limits degrading and discriminatory cross-examination of female complainants and prohibits questions about sexual history and reputation which constitute unwarranted interferences in private life.⁶⁴⁵ Two important cases from the United Kingdom have confirmed that ‘individual rights should not be treated as if enjoyed in a vacuum’.⁶⁴⁶ Lord Steyn in *R v Special Adjudicator, ex parte Ullah* stated:

[I]n deciding what amounts to a fair trial the triangulation of interests of the accused, the victim and the public interest may require compromises, eg to protect children in abuse cases, women in rape cases, and national security.⁶⁴⁷

Lord Bingham expressed similar views in *R v H*:

While the focus of article 6 of the [European] Convention [on Human Rights] is on the right of a criminal defendant to a fair trial, it is a right to be exercised within the framework of the administration of the criminal law: as Lord Steyn pointed out in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118:

‘The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public’.⁶⁴⁸

This position preserves the accused’s right to a fair trial whilst acknowledging that other participants also have claims to rights protection. Since questions about the complainant’s sexual reputation or sexual history do not assist in the adjudication of the

triangulation of interests perspective on a fair trial see Don Mathias, ‘The Accused’s Right to a Fair Trial: Absolute or Limitable’ (2005) 21 *New Zealand Law Review* 217.

⁶⁴¹ See *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; *R v H* [2004] UKHL 3.

⁶⁴² Gans et al, above n 100, 381.

⁶⁴³ See, eg, *Criminal Procedure Act 1986* (NSW) s 306U; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 5; *Criminal Procedure Act 2009* (Vic) ss 366, 369; *Evidence Act 1906* (WA) s 106H.

⁶⁴⁴ See, eg, *Criminal Justice Act 2003* (UK) ss 116(2)(e), (4); *Evidence Act 2006* (NZ) s 105(1)(d).

⁶⁴⁵ A recent decision of the United Nations Human Rights Committee found that cross-examination of the complainant about her sex life violated several rights guaranteed by the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976). These include article 7 (freedom from cruel, inhuman or degrading treatment), article 17 (freedom from arbitrary interference in private life) and article 26 (the right to non-discrimination): *LNP v Argentine Republic*, UN Doc CCPR/C/102/D/1610/2007.

⁶⁴⁶ *R v H* [2004] UKHL 3 [12].

⁶⁴⁷ *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26 [44].

⁶⁴⁸ *R v H* [2004] UKHL 3 [12].

elements of rape, particularly in the context of a positive consent standard, protecting the complainant from discriminatory lines of questioning presents no threat to the accused's fair trial rights.

In Canada, the dialogue about human rights and the treatment of the complainant in rape trials has largely focused on the equality right set out in s 15 of the *Canadian Charter of Rights and Freedoms*.⁶⁴⁹ Section 15 provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Despite judicial comment confirming the equality rights of victims as relevant considerations in the trial,⁶⁵⁰ historically there has been tension between Parliament and the courts over the impact that s 15 has in the context of the cross-examination of sexual assault complainants. Legislative protections for women have been enacted only to be read down by courts in the interests of the accused's purported fair trial rights.⁶⁵¹ In recent times, however, Parliament's endorsement of an 'equality rationale'⁶⁵² for shield provisions has been strengthened. A series of amendments to sexual offences provisions in the Criminal Code⁶⁵³ during the 1990s contain separate preambles explaining the gendered nature of sexual assault and how its effects are experienced disproportionately by women and children. The preambles refer explicitly to the equality rights protection in s 15 of the *Charter*.⁶⁵⁴ The Hon Madame L'Heureux-Dubé draws an explicit link between s 15 and the legal interpretation of consent to sexual relations. Following the Supreme Court's decision in *R v Ewanchuk*⁶⁵⁵ which rejected the notion of implied consent, she concluded that 'substantive equality requires that consent to sexual relations be viewed as a two-way act of communication. ... Thus, where consent is at issue as part of the actus reus of the offence, the court must consider the perspective of both parties'.⁶⁵⁶ The parallel with the aspirations of mutuality and reciprocity reflected in the amended Tasmanian consent provisions is obvious. In the absence of a human rights instrument in Tasmania, it may be difficult to identify the rights guarantees to which victims of sexual

⁶⁴⁹ *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

⁶⁵⁰ For example, in *R v Osolin* [1993] 4 SCR 595, Cory J stated: 'The provisions of ss 15 and 28 of the *Charter* guaranteeing equality to men and women, although not determinative should be taken into account in determining the reasonable limitations that should be placed upon the cross-examination of a complainant.' at 669.

⁶⁵¹ Diana Majury, 'The *Charter*, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 *Osgoode Hall Law Journal* 297, 321.

⁶⁵² *Ibid*.

⁶⁵³ *Criminal Code*, RSC 1985, c C-46.

⁶⁵⁴ See Majury, above n 112, 321.

⁶⁵⁵ [1999] 1 SCR 330.

⁶⁵⁶ Claire L'Heureux-Dubé, 'Beyond the Myths: Equality, Impartiality, and Justice' (2001) 10(1) *Journal of Social Distress and the Homeless* 87, 98.

assault and prosecutors in sexual offences cases may appeal to prevent the invocation of myths and prejudices in the trial of sexual offences and even more difficult to identify the mechanisms by which they are protected.⁶⁵⁷ However, trial judges have the discretion to interpret substantive and procedural legislation in accordance with established principles of statutory interpretation (the principle of consistency, for example) which enable them to incorporate human rights principles and reference human rights decisions in interpreting legislation.⁶⁵⁸

Thus, a human rights angle could be a sound basis on which judicial directions to the jury are formulated. The reform provisions in the Tasmanian Criminal Code could be explained by trial judges in just the same way as the Canadian provisions were in *Ewanchuk* to make clear to juries just what their objective is.

8.4.2 Other Initiatives

This chapter argues that the reforms have been undermined by shortcomings in the way the legal actors put them into practice, rather than defects in the structure of the consent provisions themselves. It may be, therefore, that compulsory education for legal personnel and a comprehensive re-evaluation of the way that the concepts of consent and mistaken belief in consent are explained to the jury will reduce the influence of traditional rape stereotypes and bring about a more effective engagement with the positive consent standard in the courtroom. Beyond these relatively uncontroversial interventions, however, more radical reform initiatives have been mooted to tackle the cultural attitudes and prejudices that stymie rape law reform. These proposals entail a fundamental departure from traditional legal principles in relation to the onus of proof and the admissibility of evidence at trial and ultimately challenge the previously unquestioned primacy of the adversarial trial and the incarceration of convicted offenders as the best responses to crimes of sexual violence. An exploration of any of these proposals offers scope for a Doctoral thesis in its own right. Three only are mentioned here in passing, intended as no more than stepping off points to further investigation and analysis.

⁶⁵⁷ In relation to the difficulties of identifying the role that human rights principles play in the criminal law context generally see Gans et al, above n 100, ch 2.

⁶⁵⁸ Such mechanisms are often referred to as ‘a common law bill of rights’: Gans et al, above n 100, citing Chief Justice J J Spigelman, ‘The Common Law Bill of Rights— First Lecture in the 2008 McPherson Lectures: Statutory Interpretation and Human Rights’ (Speech delivered at the University of Queensland, Brisbane, 10 March 2008); Chief Justice J J Spigelman, ‘Blackstone, Burke, Bentham and the *Human Rights Act 2004* (ACT)’ (Keynote Address delivered at the 9th Criminal Law Congress, Canberra, 28 October 2004).

8.4.2.1 Placing an Evidentiary Onus on the Accused in Relation to Affirmative Consent?

The legal concept of consent is expressed as affirmative free agreement. Traditionally the prosecution bears the burden of proof to establish beyond reasonable doubt that the complainant did not signal her agreement to the proposed sexual activity and also that her behaviour could not reasonably be interpreted by the accused as an indication of positive agreement. In considering whether the burden of proof has been discharged the jury will consider whether evidence has been adduced that could support an inference of consent. Often they will only hear the complainant's version of events as the accused may exercise his right to silence. Accordingly, evidence of positive consent may not be adduced and the often central issue of communicated consent may not be adequately dealt with. Characteristically, rape cases are distinguished from other offences in that the accused and the complainant are the only witnesses to the incident. There is, therefore, an argument that the accused should always be required to justify an assertion that the complainant positively conveyed consent. This would mean that an evidentiary burden is placed on the defence in relation to evidence of affirmative consent. Such a requirement is not novel in the context of the consent provisions in the Code. An evidentiary onus already exists in relation to the defence of mistake. In order to enliven the defence there must be an evidentiary basis for the mistaken belief, and the defence will not be available if there is no evidence that the accused took reasonable steps to ascertain the existence of consent. Since an assertion that the complainant consented effectively amounts to the same thing as asserting a belief that she consented, there seems no logical reason for imposing an evidentiary onus in one case but not in the other.

The imposition of even an evidentiary onus will, however, inevitably carry human rights implications. Potentially, such a requirement may infringe fair trial rights exemplified by the right to the presumption of innocence and the associated right to remain silent. The presumption of innocence is a corollary of the fundamental common law principle that the prosecution must prove all elements of a criminal charge, stated most famously by Viscount Sankey in *Woolmington v Director of Public Prosecutions*:

Throughout the web of English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to ... the defence of insanity and subject also to any statutory exception. ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.⁶⁵⁹

⁶⁵⁹ [1935] AC 462.

The right is also enshrined in article 14(2) of the *International Covenant on Civil and Political Rights*.⁶⁶⁰ Tasmanians are not protected by a human rights instrument⁶⁶¹ although both international human rights instruments and common law principles have a role to play in rights protection in this State⁶⁶² and may provide guidance on whether a proposal such as this is likely to be accepted. The classic quote from *Woolmington* above, acknowledges that the ‘golden thread’ is subject to statutory exceptions and these have not been infrequent.⁶⁶³ Case law since *R v Turner*⁶⁶⁴ in the 19th century has sought to establish a principled basis for the creation of exceptions to the presumption of innocence. Considerations such as the difficulty of discharging the burden of proof for either party or whether facts are peculiarly within the defendant’s knowledge have been commonly argued justifications.⁶⁶⁵ Even where the presumption of innocence is perhaps better protected within a human rights framework, as in the United Kingdom for example, courts have evidenced a willingness to accept derogation of the right, at least where the derogation is constituted by the imposition of an evidential rather than a legal burden. The assessment of whether the impingement of fair trial rights is permissible is based on the question of proportionality.⁶⁶⁶ In the United Kingdom considerations that are relevant to the assessment of proportionality have been held to include:

The opportunity given to the defendant to rebut the presumption, maintenance of the rights of defence ... retention by the court of a power to assess the evidence ... and the difficulty which a prosecutor may face in the absence of a presumption.⁶⁶⁷

Placing an onus on the accused to point to evidence capable of enlivening the issue of consent arguably is not a disproportionate response to the difficulties that the

⁶⁶⁰ *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁶⁶¹ Two Australia jurisdictions have adopted human rights instruments. These are the Australian Capital Territory — *Human Rights Act 2004* (ACT) — and Victoria — *Charter of Human Rights and Responsibilities Act 2006* (Vic). Australia is the only common law country that does not have a national Bill of Rights in some form.

⁶⁶² International law also offers some human rights protection. For example, Australia has acceded to the First Optional Protocol to the ICCPR which establishes an individual communications procedure in relation to the ICCPR. Accordingly, an individual may seek a determination on the compliance of an Australian law with the ICCPR. An individual communication brought in respect of a Tasmanian law criminalising consensual sex between adult males in private eventually led to the repeal of the discriminatory Criminal Code provision. See *Toonen v Australia* UN Doc CCPR/C/50/D/488/1992, 1994. For a comprehensive coverage of the role of human rights principles in the criminal justice context see Gans et al, above n 100, ch 2.

⁶⁶³ See Andrew Ashworth ‘Four Threats to the Presumption of Innocence’ (2006) 10 *International Journal of Evidence and Proof* 241; Gans et al, above n 100, 462.

⁶⁶⁴ [1814–1823] All ER 713.

⁶⁶⁵ See Gans et al, above n 100, 463–5.

⁶⁶⁶ *Salabiaku v France* (1988) 13 EHRR 379. Ashworth argues: ‘In practice, both the Strasbourg Court and some British courts have ... applied a rather loose concept of proportionality to such decisions’: Ashworth, above n 124, 258.

⁶⁶⁷ *Sheldrake v Director of Public Prosecutions* (conjoined appeal with *Attorney-General’s Reference No 4 of 2002*) [2005] 1 AC 264, [21].

prosecution faces in establishing absence of consent. If the jury entertains a reasonable doubt about consent, that doubt must relate to the legal notion of consent, that is, free, affirmative agreement. If the accused asserts that the complainant consented, in effect his assertion is that she demonstrated her agreement in some way. It should, therefore, not be an unreasonable imposition to require the accused to provide evidence about the way that consent was conveyed. It is not argued that absence of consent may be presumed necessarily where the evidentiary onus is not satisfied or where the accused fails to give evidence. Such a conclusion might countenance a situation where the finder of fact is obliged to make a finding of guilt, even where they retain reasonable doubts about the ingredient of absence of consent. However, it may be that the court would be permitted to draw an adverse inference from the failure of the accused to give evidence in situations such as rape cases without third party witnesses. Neither is it being suggested that the legal onus of proof is reversed. Some critics of the 2004 reforms argued, mistakenly, that this was the effect of the amendments to the consent provisions.⁶⁶⁸ This was also a relatively common misperception that was apparent in the interviews with legal counsel. An experienced defence counsel expressed concerns that, particularly in relation to s 14A, some jurors have the impression that the onus of proof is reversed, that is, that the accused now bears the burden of proving on the balance of probabilities that he held an honest and reasonable belief that the complainant was consenting.⁶⁶⁹ Another interviewee considered that s 14A necessitated proof by the accused that none of the enumerated circumstances applied, that is, his mistake was not induced by intoxication, that he was not reckless as to the existence of consent and that he had taken reasonable steps to ascertain that the complainant was consenting.⁶⁷⁰ Such criticisms, though, are ill-founded, and merely demonstrate misunderstandings about the substance of the reforms.

8.4.2.2 Expert Witnesses

Rectification of juror misconceptions about sexual assault and its victims lies at the heart of successful rape law reform. A possible mechanism to effect change may be to permit rape trauma experts to give evidence in court about patterns of victim behaviour. The notion that victims exhibit specific behaviours that can be categorised as post-traumatic

⁶⁶⁸ Tasmania, *Parliamentary Debates*, House of Assembly, 3 December 2003, 51–5 (Michael Hodgman, Shadow Attorney-General).

⁶⁶⁹ Interview with defence counsel (Telephone Interview, 12 July 2011). Counsel's belief that jurors were confused about the onus of proof was explained on the basis of questions asked in the course of their deliberations.

⁶⁷⁰ Interview with defence counsel (Hobart, 11 October 2010).

reactions to sexual assault was first advanced by Burgess and Holstrom.⁶⁷¹ It has received broadest acceptance in the United States but even in that jurisdiction it remains controversial.⁶⁷² The methodology of the initial study and of subsequent research has been criticised and the very notion that the varied and individual responses to sexual assault could amount to a syndrome in any case has been questioned both in the academic literature and by the courts.⁶⁷³ In addition, there are concerns that labelling the evidence as ‘expert opinion’ encourages jurors to conclude that a complainant who exhibits the reactions that the expert has identified as consistent with genuine victim behaviour is more likely to be telling the truth about the alleged assault.⁶⁷⁴ However, it remains the case that the admission of expert testimony on the spectrum of victim reactions to sexual assault is by no means unprecedented. In the United Kingdom the Home Office proposed that general expert evidence be admissible in rape cases,⁶⁷⁵ although ultimately this proposal was not taken up.⁶⁷⁶

The purpose of introducing such evidence is to convince the jury that the complainant’s behaviour post-assault, even though it may not meet their expectations of how genuine victims react, is nevertheless consistent with an identified syndrome, so-called rape trauma syndrome (RTS). In Tasmania, the possibility of admitting expert evidence already exists if provisions in the *Evidence Act 2001* are imaginatively interpreted. Section 79 of the Act operates as an exception to the general prohibition on the admission of opinion evidence created in s 76⁶⁷⁷ and s 108C operates as an exception to the credibility rule in s 102.⁶⁷⁸ These provisions were designed to clarify the position in

⁶⁷¹ Ann Wolbert Burgess and Lynda Lytle Holmstrom, ‘Rape Trauma Syndrome’ (1974) 131(9) *American Journal of Psychiatry* 981.

⁶⁷² See, eg, Bruce D Sales, Mary P Koss and Laura E Boesch, ‘Rape Trauma Experts in the Courtroom’ (1998) 4(1-2) *Psychology, Public Policy, and Law* 414; Patricia A Frazier and Eugene Borgida, ‘Rape Trauma Syndrome’ (1992) 16(3) *Law and Human Behavior* 293; Toni Massaro, ‘Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and its Implications for Expert Psychological Testimony’ (1985) 69(3) *Minnesota Law Review* 395. In relation to the admissibility of rape trauma expert evidence generally see Ellison and Munro, above n 61; Louise Ellison, ‘Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases’ (2005) 9 *International Journal of Evidence and Proof* 239; P Tetreault, ‘Rape Myth Acceptance: A Case for Providing Educational Expert Testimony in Rape Jury Trials’ (1989) 7 *Behavioural Sciences and the Law* 243.

⁶⁷³ Frazier and Borgida, above n 133, 299–301.

⁶⁷⁴ Ian Freckleton, ‘Child Sexual Abuse Accommodation Evidence: The Travails of Counterintuitive Evidence in Australia and New Zealand’ (1997) 15(3) *Behavioral Sciences and the Law* 247, 264.

⁶⁷⁵ Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape* (2006).

⁶⁷⁶ See Office for Criminal Justice Reform, *Convicting Rapists and Protecting Victims – Justice for Victims of Rape: Response to Consultation* (2007).

⁶⁷⁷ *Evidence Act 2001* (Tas) s 76: ‘(1) Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.’

⁶⁷⁸ *Ibid* s 102: ‘Credibility evidence about a witness is not admissible.’

relation to expert evidence of the impact of sexual abuse on children after such evidence was ruled inadmissible in the Tasmanian case of *Ingles*.⁶⁷⁹ Section 79 permits the admission of opinion evidence where that opinion is ‘wholly or substantially’ based on a person’s specialised knowledge gained through training, study or experience. Section 79(2) is particularly relevant in the context of sexual offences. It specifically includes within the exception to the opinion rule, expert evidence relating to the impact of sexual abuse on children. This provision suggests that, by analogy, such evidence may be more generally admissible.

The question of admissibility may well hinge, therefore, on whether the court is prepared to accept that insights into typical reactions to sexual assault amount to specialised knowledge. The main issues will be relevance and whether or not the recognised field of expertise test applies under the uniform *Evidence Acts*. This is unsettled. In the High Court case of *HG v The Queen*,⁶⁸⁰ Gaudron J stated that the common law test was that the expert’s knowledge or experience be in an area ‘sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience’.⁶⁸¹ Her Honour concluded, ‘[t]here is no reason to think that the expression “specialised knowledge” gives rise to a test which is in any respect narrower or more restrictive than the position at common law.’⁶⁸² This analysis of the test is reflected in the decision of the Court of Appeal case, *Doddridge v Tasmania*.⁶⁸³ In this case, a police officer’s opinion about the point of impact of two vehicles was admitted on the basis of his training and experience in motor vehicle accident scenes. Accordingly, it may be that a persuasive argument for the admission of expert opinion in relation to RTS can be mounted without concerns that the scientific reliability of the method will assume the importance that it has done in other jurisdictions.⁶⁸⁴

Section 108C of the *Evidence Act 2001*, an exception to the credibility rule, may also offer a route for the admission of expert evidence relating to RTS. According to s

⁶⁷⁹ *Ingles v The Queen* (Unreported, Tasmanian Court of Criminal Appeal, Green CJ, Crawford and Zeeman JJ, 4 May 1993). Compare a later decision in *Bellemore v Tasmania* (2006) 16 Tas R 364. In the later case, heard after the amendments to s 79, it was held on appeal that evidence of a psychiatrist about the impact of sexual abuse on children and their behaviour was admissible by virtue of s 79: at [214].

⁶⁸⁰ (1999) 197 CLR 414.

⁶⁸¹ Her Honour was quoting from *R v Bonython* (1984) 38 SASR 45, 46–7; *Clark v Ryan* (1960) 103 CLR 486, 491; *Murphy v The Queen* (1989) 167 CLR 94, 111, 130; *Farrell v The Queen* (1998) 72 ALJR 1292, 1295; *Osland v The Queen* (1998) 159 ALR 170, 184.

⁶⁸² *HG v The Queen* (1999) 197 CLR 414, [58].

⁶⁸³ (Unreported, Tasmanian Court of Criminal Appeal, Crawford CJ, Tennent and Porter JJ, 11, 12 August, 11 November 2010).

⁶⁸⁴ See Frazier and Borgida, above n 133, 296.

102 of the Act, evidence that relates solely to the credibility of a witness is inadmissible.⁶⁸⁵ However, s 108C provides the following exception:

- (1) The credibility rule does not apply to evidence given by a person concerning the credibility of another witness if –
 - (a) the person has specialised knowledge based on the person’s training, study or experience; and
 - (b) the evidence is evidence of an opinion of the person that –
 - (i) is wholly or substantially based on that knowledge; and specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse
 - (ii) could substantially affect the assessment of the credibility of the witness; and
 - (c) the court gives leave to adduce the evidence.⁶⁸⁶

Arguably, this provision can be employed to bolster the complainant’s account of her reaction to the sexual assault by adducing expert evidence that the account is consistent with genuine, or expected, victim reactions. There seems to be no reason, in principle, why credibility evidence that relates to the behaviour of adult victims of sexual abuse should not also be admissible in the same way that evidence relating to the behaviour of child victims of sexual abuse already is. It may be, therefore, that in Tasmania, the groundwork for the recognition of expert testimony in relation to the effects of sexual assault has already been laid. The joint report of the Australian and New South Wales Law Reform Commissions on the operation of the uniform Evidence Acts⁶⁸⁷ examined whether there was a need to amend s 79 to provide for the admissibility of expert evidence in relation to other victims of sexual violence. In a further sign that the reception of such evidence may be unproblematic, the Commissions concluded that ‘no reluctance to admit such evidence was shown that would warrant amendment of the uniform Evidence Acts’.⁶⁸⁸

8.4.2.3 A Restorative Justice Approach

Restorative justice is an omnibus term that comprehends a range of practices sharing a common feature that ‘all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’.⁶⁸⁹ Victims meet with the offender in the company of various support

⁶⁸⁵ *Evidence Act 2001* (Tas) s 102. Section 102 refers to ‘credibility evidence’ which is defined (in part) in s 101A as evidence that ‘is relevant only because it affects the assessment of the credibility of the witness or person’.

⁶⁸⁶ The only difference between s 79 and s 108C is that the former provision refers to the ‘opinion rule’ rather than the ‘credibility rule’.

⁶⁸⁷ Australian Law Reform Commission, *Uniform Evidence Acts*, Report No 102 (2006).

⁶⁸⁸ *Ibid* 322.

⁶⁸⁹ Tony Marshall, Home Office (UK), *Restorative Justice: An Overview* (1999) 5.

personnel either face-to-face or via some form of intermediary.⁶⁹⁰ These so-called ‘conferences’ may offer the accused diversion from the court process or they may occur pre- or post-sentence.⁶⁹¹ The conferences are not concerned with adjudication of the facts thus such an approach can only proceed where the offender accepts responsibility for the offence. The proposition that restorative justice practices might be employed in the context of sexual offences is controversial⁶⁹² and much of the opposition has come from feminist quarters. Feminist arguments consider that restorative justice processes are too lenient on offenders and that enabling sexual offences to be dealt with otherwise than by punitive sanctions undermines the feminist gains that have been made in recognising rape as a serious criminal offence. Critics also point to the danger that the conference setting poses a risk to the victim and the potential that the experience will amount to re-victimisation. They also argue that if the resolution of sexual crime is removed from the criminal justice context it once again becomes a private wrong that is not a concern in the wider social context. So much feminist activism over the past decades has sought to challenge the view that allegations of sexual assault are best left to the parties themselves to sort out.⁶⁹³

Conventionally, sexual offences are not considered to be amenable to resolution by restorative practices and thus they are excluded from most restorative justice projects.⁶⁹⁴ Where sexual offences are included this is generally only in relation to young offenders.⁶⁹⁵ However, there are cogent arguments for considering the application of restorative practices to sexual assaults more broadly.⁶⁹⁶ At the outset they ensure that an offender accepts responsibility and is held accountable for the offence. They avoid the need for the victim to give evidence in open court and the potential that the experience will amount to a ‘second-rape’⁶⁹⁷ and as a consequence may encourage greater rates of reporting. Where, as is often the case, the outcome is unlikely to involve a custodial sentence they may encourage more honest disclosure by offenders. They also neutralise the myth of the abnormal, stranger rapist and in so doing may expose the true reality of

⁶⁹⁰ Kathleen Daly, ‘Conventional and Innovative Justice Responses to Sexual Violence’ (2011) 12 *ACSSA Issues* 10.

⁶⁹¹ *Ibid.*

⁶⁹² Julie Stubbs, ‘Restorative Justice, Gendered Violence and Indigenous Women’ in James Ptacek (ed), *Restorative Justice and Violence against Women* (Oxford University Press, 2010) 105.

⁶⁹³ See Clare McGlynn, ‘Feminism, Rape and the Search for Justice’ (2011) 31(4) *Oxford Journal of Legal Studies* 825, 829.

⁶⁹⁴ Daly, above n 151, 19–20.

⁶⁹⁵ *Ibid* 18–19.

⁶⁹⁶ It is clear that such practices will not be suitable in all sexual offences cases. Great care must be taken to ensure victim safety and to manage power dynamics which create the potential for further victimisation.

⁶⁹⁷ See Burman, above n 96; Temkin, above n 96; Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (Open University Press, 1997) ch 3.

the typical rapist. In a sense the perpetrator becomes domesticated, someone who is not labelled as deviant, but an ordinary man — an acquaintance, a partner, a work colleague. Importantly, they may also serve a useful educative function, bringing home to the sexual offender, in the way an adversarial trial may not be able to do, the reality of the harm he has caused. At the heart of restorative practices lies the question of what constitutes justice for victims of sexual assaults. If justice is only considered to have been won where the offender is convicted and incarcerated then the poor conviction rates for sexual offences indicate that many victims of sexual assault are denied justice. If, however, justice is given a much broader interpretation that includes having your story heard and believed, a clear acknowledgment that it is the perpetrator who has done wrong, having the offender understand how they have harmed you and seeing him express remorse then a willingness to explore the possibilities that restorative justice practices offer may deliver justice for many more victims.⁶⁹⁸

8.5 Conclusion

This thesis seeks to make a significant contribution to the literature on the problems of consent in the context of sexual offences and the difficulties posed by the persistence of stereotypical attitudes about rape, rape victims and the perpetrators of this crime. It adopts as its focus the amended consent provisions of the Tasmanian Criminal Code, an example of a legislative response to these problems that hitherto has not been researched. The core of the project is an empirical analysis of sexual offences trials heard in the Tasmanian Supreme Court, but the thesis positions itself within a broader rape law reform agenda by exploring legal responses in other national and international common law jurisdictions and by articulating suggestions for further reform that in many cases could be generally applicable.

The hope of the 2004 reforms to the Tasmanian Criminal Code was that men would no longer be able to escape penal consequences for the sexual violation of others merely because they, or the trier of fact, cling to sexist fictions that do not reflect the realities of rape. The reform architects constructed a new legal notion of consent that is characterised by mutual respect and sexual self-determination. The effect is to reconfigure the crime of rape such that the offence extends beyond traditional examples of coerced sex, to encompass a much broader range of circumstances where sexual intercourse is pursued in the absence of positive indications of free agreement. Behind the reforms lies the aspiration that, ultimately, if misogynistic attitudes no longer offer an

⁶⁹⁸ See generally McGlynn, above n 154.

escape from conviction those attitudes will be displaced in the cultural understanding of sexual relations.⁶⁹⁹

The thesis suggests that myths about rape are the residue of historical attitudes that can no longer be explained by prevailing social and cultural conditions. Their longevity may in part account for their intransigence and the unwarranted influence they continue to exert in the trial of sexual offences. If legislative reform is to be successful, therefore, it must first confront and then disarm entrenched attitudes that deny justice to female rape complainants. Legislative change alone will not be sufficient. The changes must also be implemented in a practical way in the trial setting and in the wider criminal justice system context as a whole. The central finding of this research is that the reforms are not being implemented as intended and thus, the concluding sections of this chapter proposed further reform initiatives for consideration. Some of these may be controversial and it may be a difficult and protracted task to gain their acceptance. In the short term, however, it may be that tailoring addresses to the jury on the legal notion of consent and the protocols that accompany consideration of the defence of mistaken belief in consent, in a way that is faithful to the intentions of the reforms, will yield significant results. If the prosecution's case theory is made explicit in opening addresses and emphasises the positive communication standard set by the new definition of consent the jury will be encouraged to evaluate the evidence about consent that is put before them according to that standard. If judges explicitly rule on the correct interpretation of the reasonable steps requirement a principled approach is set down for future cases. If the distinction between the domestic and legal notions of consent is made clear to jurors and if they are admonished by the prosecution and the trial judge to adopt 'data-driven' information processing, prejudicial assumptions about rape, rapists and rape victims have a better chance of being eliminated from their deliberations.

One note of cautious optimism can perhaps be sounded: the resolution of the challenging problem of the influence of rape myths on outcomes in sexual offences cases may simply come with the passage of time. Several prosecution counsel seem to anticipate that the next generation of jurors will have different attitudes about female sexual autonomy and the conduct of sexual relations in general and will be receptive to the notion of communicative sexuality and the insistence on a positive consent standard.⁷⁰⁰ The same hopes might be held for the next generation of legal personnel as

⁶⁹⁹ Lucinda Vandervort, 'Mistake of Law and Sexual Assault: Consent and Mens Rea' (1987–88) 2 *Canadian Journal of Women & the Law* 238, 297–8.

⁷⁰⁰ Interview with Crown counsel (Launceston, 11 April 2011); Interview with Crown counsel (Hobart, 11 July 2011).

well. If that is the case there may be reason to believe that ultimately the cultural and legal models of consensual sexual relations will align.

A constant refrain throughout this thesis has been the malign influence that myths about the crime of rape exert on the prosecution of sexual offences cases. As a final note, the following comment perfectly encapsulates the reasons why justice demands that their influence be eradicated:

[Rape myths] are irrational, non-scientific narratives used by human beings to explain what they do not fully understand. They are, therefore, incompatible with the truth-seeking function of the legal system.⁷⁰¹

⁷⁰¹ L'Heureux-Dubé, above n 114, 89, citing Justice Claire L'Heureux-Dubé, 'Au-delà des Mythes: Justice' (1994) 7 *Canadian Journal of Women and the Law* 1.

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